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In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Pages
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	4
Statement of the Case	5
Reasons Requiring Plenary Consideration	6
If Process Is Due, What Steps Are Required?	10
Other Substantial Considerations	10
Appendix, Ex. A	App. 1
Appendix, Ex. B	App. 18
Appendix, Ex. C	App. 20

CASES CITED

Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 ..... 9, 10, 11

Meachum v. Fano, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 ..... 6, 8, App. 7, 8, 9

Montanye v. Haymes, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 ..... 6, 7, 9, App. 7, 9

Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 ..... 9, 10, 11, App. 8, 10, 16

Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 ..... 9, 10, 11, App. 9, 11, 12, 16

STATUTES CITED

	Pages
28 U. S. C. § 1253	3, App. 18
28 U. S. C. § 1343(3) and (4)	2, App. 4
28 U. S. C. § 2201	2, App. 4
28 U. S. C. § 2202	2, App. 4
28 U. S. C. § 2281	2, App. 18
42 U. S. C. § 1983	2, App. 4
Public Law 94-381, Sec. 2, 90 Stat. 1119	2
Neb. Rev. Stat. § 83-173 (Reissue 1976)	6
Neb. Rev. Stat. § 83-176 (Reissue 1976)	6, 7
Neb. Rev. Stat. § 83-179 (Reissue 1976)	7, App. 22
Neb. Rev. Stat. § 83-180 (Reissue 1976)	2, 3, 6, 8, App. 2, 4, 12, 13

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment	2

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CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring a statute of the State of Nebraska to be unconstitutional and enjoining the State of Nebraska as hereinafter set forth.

OPINION BELOW

The judgment appealed from of the United States District Court for the District of Nebraska dated October 14, 1977, which is unreported, and a Memorandum of Decision and Order, both dated September 12, 1977, supporting said judgment, all of which are unreported, are annexed hereto as Exhibit A.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3) and (4), and 28 U. S. C. §§ 2201 and 2202 declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U. S. C. § 2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

On October 14, 1977, pursuant to a Memorandum of Decision and Order entered on September 12, 1977, the district court entered the final judgment which is sought to be reviewed herein, and a Notice of Appeal was filed on October 21, 1977, in the United States District Court for the District of Nebraska.

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U. S. C. § 1253.

Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) found in Volume 5, page 1112 of the official edition of the Nebraska Revised Statutes, which the United States District Court found to be unconstitutional, provides as follows:

> "(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.
>
> "(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside

the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

"(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

A copy of the Notice of Appeal herein is set forth in the Appendix as Exhibit B.

———o———

QUESTIONS PRESENTED

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

———o———

STATEMENT OF THE CASE

Plaintiff-Intervenor, Larry D. Jones (appellee), was duly convicted of the crime of robbery under Nebraska law in the District Court of Douglas County, Nebraska, and was sentenced to the Department of Correctional Services for a term of three to nine years and commenced serving said term at the Nebraska Penal and Correctional Complex, a division of the Department of Correctional Services, on or about May 31, 1974. In April of 1975 said Larry D. Jones was involuntarily transferred to the Lincoln Regional Center Security Building, a facility of a state mental hospital operated by the Department of Public Institutions of the State of Nebraska. While in said mental hospital, the inmate remains subject to the jurisdiction and custody of the Department of Correctional Services.

The maximum sentence of appellee, Larry D. Jones, will not expire until May 30, 1983, subjecting him to the custody of the Department of Correctional Services until the expiration of said sentence. William George Foote and Charles Miller (appellees) have both received their final discharge after having served their maximum sen-

tences and were no longer subject to the custody of the State of Nebraska prior to the entry of the Memorandum of Decision and judgment herein (Appendix Ex. A) and the case is moot as to them.

Said Larry D. Jones was transferred to the mental hospital, as above described, in accordance and compliance with the provisions of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), set forth above. He subsequently intervened in the present case, alleging that the foregoing statute was unconstitutional on its face and as applied by defendants and that this transfer to the said mental hospital was not within procedural due process requirements. Most of the evidence was stipulated or otherwise uncontested.

REASONS REQUIRING PLENARY CONSIDERATION

The conclusion by the court that process was due these prison inmates for transfer from one institution to another authorized by the sentence imposed appears to be contrary to the recent cases of this court of *Meachum v. Fano*, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543. Briefly, the statutory system of the State of Nebraska for the custody of persons convicted of felonies provides, in addition to the statute above set forth, that: (1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (subject to the provisions of section 83-176—not applicable here) (83-173, Neb.

Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C); (2) whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Service or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (83-176, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C); (3) upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (83-179, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C).

This court has already recognized that transfer within the state system contemplated by the criminal sentence does not give rise to a procedural due process right—that was accomplished in the criminal conviction.

In *Montanye v. Haymes, supra,* this Court stated in part:

> "We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not

> sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. NY Correc Law § 71(1) (Supp. 1975-1976); 7 NYCRR § 103.10. Thereafter, the Commissioner is empowered by statute to 'transfer inmates from one correctional facility to another.' NY Correc Law § 23(1) (Supp. 1975-1976). . . ."

The same is true as to *Meachum v. Fano, supra.*

In the present case the district court recognized that the Supreme Court held in those cases that there was no due process clause liberty interest in such transfers unless there was some right or justifiable expectation rooted in State law that the inmate would *not* be transferred. It then attempts to distinguish the present case by stating that:

> ". . . [T]here was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . ."

The foregoing quote by the district court is a misreading of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), held by said court to be unconstitutional. That statute does not give the inmate an objective expectation that a transfer would not occur as stated by the district court above, but clearly gives him an expectation that he may be transferred if the physician or psychologist finds that he suffers from a mental disease or defect and is of the opinion that the person cannot be given proper treatment in the facility in which he is in. In the light of the

positive wording of this statute, together with the other state statutes mentioned above (Appendix, Ex. C), there is no objective expectation fixed in state law that a person, after classification, will remain in any one institution.

Neither is due process triggered as it was in *Morrissey v. Brewer,* 408 U. S. 471 (parole), *Gagnon v. Scarpelli,* 411 U. S. 778 (probation), or *Wolff v. McDonnell,* 418 U. S. 539 (good time), all of which were based upon the taking away of a positive grant affirmatively conferred by state law.

This Court further stated in *Montayne v. Haymes,* 427 U. S. 236 at 242:

> ". . . As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. . . ."

In the present case the district court put great reliance upon its findings that transfer to a mental hospital carried stigmatizing consequences, behavior modification, etc. amounting to a "grievous loss" citing *Wolff v. McDonnell* and *Morrissey v. Brewer, supra.* These considerations would seem to be irrelevant where the transfer is within the sentence imposed and not otherwise violative of the Constitution. (There was no challenge or finding that the conditions in the hospital or other areas within or without the Penal Complex where inmates may be transferred were violative of the Constitution.)

———o———

IF PROCESS IS DUE, WHAT STEPS ARE REQUIRED?

The three-judge district court not only held that all of the requirements of *Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra,* and *Wolff v. McDonnell, supra,* must be followed but also added the requirement that legal counsel, furnished by the state, if the inmate is financially unable to furnish his own, must be made available. This, in spite of the fact that this Court considered but refused to make a requirement of legal counsel in all three of the above cases (Memorandum of Decision, App. pp. 12 and 13, Appendix, Ex. A).

———o———

OTHER SUBSTANTIAL CONSIDERATIONS

The three-judge court rendering the judgment in the present case consisted of two of the three district judges for the District of Nebraska and a judge from the United States Court of Appeals for the Eighth Circuit. If this judgment is permitted to stand, the officials of the Department of Correctional Services and the Department of Public Institutions wil be constrained to follow its burdensome procedures, not only in every case of a transfer of a prison inmate to a mental hospital, but also in transfer of other inmates to facilities outside the Department of Corrections under the threat or fear of forfeiting their qualified immunity (thus encouraging actions for damages) for knowing failure to follow this precedent in the district.

Obviously, if they cannot transfer Larry D. Jones, appellee, while he is in custody, they cannot, without such procedure, transfer any other prison inmate for similar treatment or rehabilitation.

This Court has already pointed out the problems to a requirement of counsel, equally apropos here, in *Morrissey Scarpelli,* and *Wolff, supra.*

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed October 14, 1977)

JUDGMENT

Dept. of Justice, September 13, 1977, State of Nebraska

Pursuant to the memorandum of decision of September 12, 1977, filing 57, and the proposals for release subsequently submitted by the parties,

IT HEREBY IS ADJUDGED AND DECREED:

1. That § 83-180 (1), Nebraska R. R. S. 1943, is declared to be unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law;

2. That this lawsuit is moot as to the plaintiff Charles Miller and as to the plaintiff-intervenor William George Foote and the action is therefore dismissed as to them; and

3. That the defendants are enjoined from transferring the plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal sentence which he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause

for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

Dated October 14, 1977.

By THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed September 12, 1977)

MEMORANDUM OF DECISION

Dept. of Justice, September 13, 1977, State of Nebraska

APPEARANCES: For plaintiff and plaintiffs-intervenors, Thomas A. Wurtz

For defendants,
Mel Kammerlohr, Assistant Attorney General

Four[1] men who have been transferred involuntarily from the Nebraska Penal and Correctional Complex to the Security Unit of the Lincoln Regional Center because of claimed mental disease or defect challenge the constitutionality of the state statute under which they were transferred.

The action is brought pursuant to 42 U. S. C. § 1983 and jurisdiction is granted by 28 U. S. C. §§ 1343 (3) and (4), as well as 28 U. S. C. §§ 2201 and 2202, which authorize declaratory and injunctive relief.

Under attack is § 83-180, R. R. S. Neb. 1943[2], which provides:

". . . [W]hen a physician or psychologist designated by the [Director of Correctional Services] finds that a person committed to the [Department of Correctional Services] suffers from a mental disease or defect, the chief executive officer may order such per-

son to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

Much of the evidence was stipulated or otherwise uncontested. Each of the plaintiffs was separately convicted for violations of Nebraska criminal law and sentenced to the Department of Correctional Services to a term of years. Each plaintiff began serving his term in the Nebraska Penal and Correctional Complex, which is within the Department of Correctional Services, but was involuntarily[3] transferred to the Lincoln Regional Center, which is not within the Department of Correctional Services but is within the Department of Public Institutions. Each was transferred without any formal notice or hearing or any safeguard other than determinations by one or more psychiatrists that the prisoner suffered from a mental disease or defect and that he could not be given proper treatment in the Nebraska Penal and Correctional Complex.

Inmates at the Penal Complex are provided access to certain psychiatric care and treatment, but the institution does not have a staff and facilities necessary to provide for all mental health needs which may arise. It does have a psychiatric care unit, which can be used as living

quarters for inmates whose conditions require that they be separated from the general population, and a hospital, where more closely guarded and segregated conditions may be imposed. Inmates within the psychiatric care unit or the prison hospital are subjected to a schedule more restrictive than that of the general prison population, but are not required to undergo psychiatric treatment involuntarily.

The Security Unit of the Lincoln Regional Center is a hospital owned and operated by the State of Nebraska for the purpose of treatment of emotional and mental disorders. Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs and to take whatever medication may be prescribed for them. Confinement conditions are substantially more restrictive than those at the Penal Complex in that the patients have less freedom of movement, are under constant supervision, have substantially fewer recreational and vocational opportunities, are unable to earn money, and must spend most of their time in their wards. When the Lincoln Regional Center determines that an inmate no longer needs to remain at the Lincoln Regional Center, arrangements are made to return the prisoner to the Penal Complex.

I.

The Fourteenth Amendment to the Constitution of the United States forbids any State to "deprive any person of . . . liberty . . . without due process of law." When a person already has lost much of his liberty because he is imprisoned, not every change of status while he is im-

prisoned amounts to a loss of "liberty" within the meaning of the Constitution. The opinions in *Meachum v. Fano*, 427 U. S. 215 (1976), and *Montayne v. Haymes*, 427 U. S. 236 (1976), are to the effect that it is not merely the gravity of the disadvantage imposed upon the prisoner by changes of location that determines whether the liberty interest is entitled to the protection of due process. The court in *Montayne* said at page 242:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events."

The plaintiffs here were not transferred from one "prison" to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes.[4] The evidence shows that transfers to the Lincoln Regional Center are conditioned upon a finding that the prisoner suffers from a mental disease or defect and cannot be adequately treated within the Penal Complex. The statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that transfers to the Lincoln Regional Center are so conditioned in practice. Inmates are not assigned to the Lincoln Regional Center for any administrative or correctional purposes. Therefore, there was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from

a mental disease or defect and that it cannot be adequately treated at the Penal Complex. This case, therefore, comes within the exception noted in *Meachum*. Furthermore, the fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a "major change in the conditions of confinement"[5] amounting to a "grievous loss"[6] to the inmate. We therefore hold that due process attached to the plaintiffs' liberty interest, and the task of the court is to determine what process is due and whether the procedures provided to these plaintiffs were adequate. See *Morrissey v. Brewer*, 408 U. S. 471, 484 (1972).

II.

Because due process is a flexible concept to be fitted to each setting, some analytical framework is helpful in deciding the specific steps that fit a specific setting. *Mathews v. Eldridge*, 424 U. S. 319, 334-355 (1976), suggests

> "... [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g.*, *Goldberg v. Kelly, supra*, at 263-271."

As to the first factor, the private interest in this case is the plaintiffs' interest in avoiding the entry of a more controlled confinement and being labeled mentally ill. Because the plaintiffs have already been deprived of much of their freedom of choice, this private interest is not identical to the interest of nonprisoners who are being considered for civil commitment, as in *Doremus v. Farrell,* 407 F. Supp. 509 (U. S. D. C. Neb. 1975). Entry into a mental hospital still carries some distinctive stigma, which in the specific setting of this case is accompanied by techniques of behavior modification[7] not used at the Penal Complex, so the interest of the plaintiffs is not the same[8] as that of other prisoners who are being considered for transfer from one prison to another, as in *Meachum,* supra, and *Montayne,* supra, or that of other prisoners who are being taken through prison disciplinary proceedings, as in *Wolff v. McDonnell,* 418 U. S. 539 (1974).

Second, the risk of an erroneous deprivation of these private interests is relatively high where the only safeguard used is the opinion of one physician or psychologist without opportunity for anyone—the prisoner or anyone on his behalf—to question that opinion. This is especially true because the inmate may be mentally unable to understand or to challenge the conclusions. Other procedural safeguards, such as written prior notice, a hearing, written findings, and someone to speak for the one claimed to be mentally ill, have self-evident value in reducing the risk.

Third, the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy. Swiftness does not appear to be a major need, in view of the availability at the Penal Complex of physical security, some psychiatric and psychological staff, and a hospital. Hazards of calling witnesses at a hearing, either within or outside the Penal Complex, whether those witnesses are prisoners or non-prisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined.[9] Usually, the witnesses in a mental hearing will be nonprisoners.

In *Morrissey v. Brewer,* 408 U. S. 471 (1972), the court listed six procedural safeguards as minimal requirements of due process where the issue was what process is due a parolee on revocation of his conditional liberty:

1. Written notice of the claimed violations of parole;
2. Disclosure at a hearing of the evidence in support of the state's claim;
3. An opportunity to be heard in person and to present witnesses and documentary evidence;
4. The right to confront and cross-examine witnesses (unless the hearing officer specifically found good cause for not allowing confrontation);
5. A hearing before a neutral and detached hearing body, members of which do not need to be judicial officers; and
6. A written statement by the decisionmaker as to the evidence relied upon and the reasons for any adverse decision.

Each of these, and others, will be discussed in terms of a proceeding to determine whether a prisoner should be transferred to a mental hospital.

Formal notice that transfer to a mental hospital is being considered, disclosure to the prisoner of the evidence being relied upon for the transfer, and an opportunity to

be heard in person and to present documentary evidence are so fundamental that little discussion of them is needed. See *In re Gault,* 387 U. S. 1 (1967). We perceive no consideration that militates against requiring those basic and vital procedures.

Calling of witnesses by the defense and confronting of all witnesses called by the state stand on a somewhat different footing. It cannot be denied that friction between prisoners arising in or because of a hearing at which prisoners testify against prisoners is a relevant factor, at least when the hearing is within the prison, but the nature of the inquiry in a mental hearing holds a sufficiently low possibility of friction that it appears to us there is a right to call witnesses and to confront and cross-examine witnesses, except upon a finding, not arbitrarily made, of good cause for not permitting each as to a particular witness.

A neutral and detached hearing body is essential. While a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration,[10] at least the examining or treating physician or psychologist should not be permitted to vote on the commitment decision.[11] A written statement by the factfinding body as to the evidence relied upon and the reasons for transferring the inmate should be made. We see no relevant factors different from those noted by the court in *Wolff v. McDonnell,* 418 U. S. at 565.

The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a nonprisoner in the same condition. The capability to examine, understand, evaluate and challenge the process and the evidence is

vital and there may be nobody available to do so, unless it be by counsel, furnished by the state, if need be, because of indigency. The state's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals, recognized in *Wolff v. McDonnell,* 418 U. S. at 569-570, are overshadowed by the disability which accompanies one who is mentally ill.

It should be apparent that the prisoner's rights are largely illusionary unless he knows those rights. The procedure, therefore, should assure notice of them to him.

Accordingly, § 83-180 (1), R. R. S. Neb. 1943, is unconstitutional as applied to the plaintiffs, because none of the foregoing rights was afforded the plaintiffs.

To recapitulate, the minimal requirements of due process when a person is transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center are these:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

This opinion does not seek to determine whether there are other procedures that would be useful or the best way to implement the constitutional demands. Those are matters for the legislative process and not for the courts.

III.

Pursuaded as we are that § 33-180(1) is unconstitutional as applied to these plaintiffs because of due process infirmities, we resolve the action on that basis. A prime obstacle to resolving the case on equal protection grounds, as was done in *Baxtrom v. Herold,* 383 U. S. 107 (1966), is that an equal protection analysis requires a comparison of the § 83-180(1) procedure with a more favorable procedure afforded persons not in the class described in § 83-180(1). At the time the plaintiffs were transferred to the Lincoln Regional Center, the procedure used for committing nonprisoners to mental hospitals was constitutionally defective. It was so declared in *Doremus v. Farrell,* supra, as failing to provide due process. That procedure, therefore, is a poor standard for comparison purposes. The present procedure for civil commitments, found in § 83-1001, et seq., became effective on April 6, 1976, which was after the plaintiffs were transferred to the Lincoln Regional Center. We do not mean to say that an equal protection analysis could not be made; we mean only that hurdles exist which

need not be cleared. Even under an equal protection analysis, the ultimate question of the propriety of differentiating procedures for prisoners and nonprisoners probably depends upon a weighing of the factors discussed in this opinion regarding due process. Whether the Nebraska legislature ultimately decides to use a procedure for transferring prisoners to a mental hospital that differs from that for committing nonprisoners must be left to the good judgment of the legislature, limited only by constitutional strictures.

IV.

The precise relief to be ordered for the individual plaintiffs should be fashioned after suggestions from counsel. The order which is filed at the time of this memorandum will require the making of specific proposals.

The foregoing memorandum of decision constitutes the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

Dated

BY THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

Footnote 1. On August 18, 1976, this action was certified as a class action by Charles Miller on behalf of all persons presently confined in the Lincoln Regional Center, Security Building, who have been transferred there from the Nebraska Penal and Correctional Complex pursuant to §§ 83-179 and 180, and all persons presently confined to the Nebraska Penal and Correctional Complex. Following a hearing, however, the action was decertified. William McKinley Hines, William George Foote, and Larry D. Jones were added as individual plaintiffs-intervenors thereafter on their motions. Hines was returned to the Nebraska Penal and Correctional Complex and has been released on parole. No evidence has been offered to support his claim and the action evidently is no longer being pursued by him, so his claim will be dismissed. Foote and Miller have been returned to the Nebraska Penal and Correctional Complex, but remain subject to the procedures in § 83-180.

Footnote 2. Mentioned also in the complaint is a challenge to § 83-179, which provides for an evaluation of persons upon initial admission to a state institution, but this statute was not responsible for the transfer of any of the plaintiffs to the Lincoln Regional Center and it need not be dealt with separately in this case.

Footnote 3. The involuntariness of the transfer of Larry D. Jones is not crystal clear from the evidence, because he was asked by the examining psychiatrist before his transfer whether he wanted to be transferred and he said that he did, but he was offered no procedure by which he could receive independent advice on the subject and he may well not have been competent to exercise a free choice.

Footnote 4. Section 83-176, R. R. S. Neb., declares that whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services, "he shall be deemed to be sentenced or committed to the Department." The

Director of Correctional Services, according to the statute, is authorized to designate as the place of confinement of any person committed to the department "any available, suitable or appropriate residence facility or institution, whether or not operated by the state, and may transfer such person from one place of confinement to another," with some declared restrictions as to minors.

Footnote 5. See *Wolff v. McDonnell,* 418 U. S. 539, 571-572, n. 19 (1974).

Footnote 6. *Morrissey v. Brewer,* 408 U. S. 471, 482 (1972).

Footnote 7. The evidence before us would not support a statement like that made in *United States ex rel. Schuster v. Herold,* 410 F. 2d 1071, 1078 (C. A. 2nd Cir. 1969):

> ". . . Yet he [the transferred prisoner] will be confined with men who are not only mad but dangerously so. . . . [H]e will be exposed to physical, emotional and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration."

Footnote 8. These techniques were only generally described at the trial, but appear to include medication.

Footnote 9. For a discussion of the hazards related to disciplinary hearings, see *Wolff v. McDonnell,* 418 U. S. at 566-569.

Footnote 10. See *Withrow v. Larkin,* 421 U. S. 35 (1975): *Hortonville Joint School District v. Hortonville Education Association,* 426 U. S. 482 (1976); *Wolff v. McDonnell,* 418 U. S. at 570-571 (1974).

Footnote 11. See *Doremus v. Farrell,* 407 F. Supp. 509, 517 (U. S. D. C. Neb. 1975), and cases cited there.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE,
WILLIAM McKINLEY HINES,
and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, et al.,

Defendants.

ORDER

(Filed September 12, 1977)

Pursuant to the accompanying memorandum of decision,

IT HEREBY IS ORDERED:

1. That William McKinley Hines is dismissed as a plaintiff-intervenor; and

2. That counsel shall submit to the court within fifteen days of the date of this order specific proposals for the relief to be granted to the plaintiffs, consistent with such memorandum of decision.

Dated September 12, 1977.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE and
LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

NOTICE OF APPEAL

Notice of appeal is hereby given by the defendants listed from the Judgment entered hereon on or about October 14, 1977, except paragraph 2 thereof.

This appeal is taken pursuant to 28 U. S. C. § 1253, 28 U. S. C. § 2281, and 28 U. S. C. § 2282 from the judg-

ment of a three-judge court enjoining state officers from enforcing the provisions of a Nebraska state statute because of its unconstitutionality, which action was commenced on or about the 12th day of November, 1975.

Respectfully submitted,

JOSEPH VITEK, et al.,
Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By /s/ Melvin Kent Kammerlohr

Melvin Kent Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served upon the opposing counsel of record, Mr. Thomas A. Wurtz, the only party required to be served in this action, by mailing said copy, first class postage prepaid, addressed to Mr. Thomas A. Wurtz, University of Nebraska College of Law, Lincoln, Nebraska 68583.

Dated this 21st day of October, 1977.

/s/ Melvin Kent Kammerlohr

Member of the Bar of the Supreme Court of the United States

EXHIBIT C

83-173. Director of Correctional Services; duties. The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department,

sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

83-176. Director of Correctional Services; designate place of confinement; minor serious threat to safety; how determined. (1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designated primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

83-179. Person committed; physical examination; evaluation; contents; recommendations. Upon his initial admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation. He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommenda-

tions regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

Supreme Court, U. S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In The
Supreme Court of the United States

October Term, 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DOCKETED DECEMBER 20, 1977

PROBABLE JURISDICTION NOTED FEBRUARY 21, 1978

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

APPENDIX

In The
Supreme Court of the United States

October Term, 1977

—o—

No. 77-888

—o—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—o—

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DOCKETED DECEMBER 20, 1977

PROBABLE JURISDICTION NOTED FEBRUARY 21, 1978

INDEX

	Pages
Relevant Docket Entries	1

INDEX—Continued

	Pages
Complaint	3
Answer	14
Joint Stipulation of Facts	15
Complaint of Intervener	18
Answer to Intervener Larry Jones	24
Motion for Summary Judgment	25
Memorandum and Order on Motion for Summary Judgment	26
Motion to Amend the Order Denying Summary Judgment	31
Notation as to Location of the Decision and Orders in Question	32

RELEVANT DOCKET ENTRIES

Date		Proceedings
1975		
Nov 12	1	Order (WKU) granting Leave to Proceed In Forma Pauperis.
		Copy mailed to counsel of record.
Dec 2	7	Defendants' Answer.
1976		
Feb 19	12	Plaintiff's motion to certify class action.
Mar 17	17	Joint Stipulation of Facts.
Mar 18	18	Memorandum and Order (WKU) granting motion to certify class action (No. 12) and action shall proceed as a Class Action.
		Copy mailed to counsel of record.
Apr 30	27	Motion of Larry Jones to intervene as plaintiff w/copy of Complaint.
May 21	32	Complaint of Intervenor Larry Jones, with certificate of service on the Attorney General of the State of Nebraska.
		Mailed copy of Order—Filing No. 29 to Attorney General, and delivered copy to Lincoln Legal Services.
Aug 3	34	Entered Defendants' Motion for Summary Judgment filed 8-2-76.
Aug 26	40	Entered Memorandum and Order (DPL) (WKU) (RVD) filed 8-24-76 denying Defendants' motion for summary judgment (No. 34).
		Copy mailed to counsel of record.
Sep 1	41	Defendants' Motion to Amend the Order Denying Summary Judgment.

Sep 9 42 Memorandum and Order (WKU) denying Defendants' Motion to Amend Order Denying Summary Judgment (No. 41).

Copy mailed to counsel of record.

Nov 22 53 Transcript of Testimony on 11-12-76.

1977

Sep 12 57 Memorandum of Decision (WKU), (DPL), (RVD).

58 Order (WKU), (DPL), (RVD), that William McKinley Hines is dismissed as a plaintiff-intervenor; and that counsel submit within 15 days, specific proposals in accordance with Memorandum.

Copy mailed to counsel and Charles Miller of order and memorandum.

Oct 14 61 Judgment (WKU), (DPL), (RVD), that 83-180(1), Nebraska R. R. S. 1943 is declared to be unconstitutional as applied to plaintiffs; that this lawsuit is moot as to plaintiff Charles Miller and plaintiff-intervenor William George Foote, and the action dismissed as to them; and that defendants are enjoined from transferring plaintiff-intervenor Larry D. Jones from Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except under conditions prescribed in this Judgment.

Copy mailed to plaintiffs of record, counsel of record.

Oct 21 62 Defendants' Notice of Appeal with certificate of service on 10-21-77.

Dec 22 63 Order (WKU) that Clerk of this Court transmit the original pleadings, transcript, and exhibits to Supreme Court of the United States.

Copy mailed to counsel of record.

Dec 28 64 Original file, transcript, and one exhibit mailed to Clerk of Supreme Court of the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil Action No. CV 75-L-172

CHARLES MILLER, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

COMPLAINT

INTRODUCTION

This is a civil rights action on behalf of plaintiff and all other persons held at the Lincoln Regional Center, Security Building, who have been transferred from the Nebraska State Penal Complex, and all persons who are presently subject to similar transfer pursuant to Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971). Plaintiff seeks

a declaration that NEB. REV. STATS. §§ 83-179, and 83-180 (Reissue 1971) on their face and as applied by the defendants are unconstitutional for the reason that they deny plaintiff and the class he represents, due process and equal protection of the law. Plaintiff seeks injunctive relief in the form of an order that they be released from custody at the Lincoln Regional Center, Security Building, and returned to the Nebraska Penal Complex.

JURISDICTION

1. Plaintiff, individually and on behalf of all other persons similarly situated, brings this action under the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is authorized by 28 U. S. C. § 1343(3) and (4).

2. Plaintiff seeks declaratory relief pursuant to 28 U. S. C. §§ 2201 and 2202 and injunctive relief pursuant to 42 U. S. C. § 1983.

THREE-JUDGE COURT

3. This is a proper case for determination by a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284 since plaintiff seeks an injunction to restrain defendants, who are state officials, from the enforcement, operation and execution of state statutes of state-wide applicability on the ground that said state statutes are contrary to the Constitution of the United States.

PLAINTIFF

4. The plaintiff, CHARLES MILLER, is an 18 year old, black, male resident of Lincoln, Nebraska. He is a United States citizen and a single person with no one dependent on him for support. Plaintiff was convicted of

unlawful flight to avoid arrest while operating a motor vehicle in Douglas County, and was sentenced to the Nebraska Penal Complex for one to three years. He was received at the Nebraska State Penal Complex March 25, 1974, and was subsequently transferred to the Lincoln Regional Center, Security Building, May 31, 1974. Plaintiff is presently being held against his will at the Lincoln Regional Center, Security Building, pursuant to the transfer under NEB. REV. STATS. §§ 83-179 and 180 (Reissue 1971).

DEFENDANTS

5. Defendant JOSEPH VITEK, is the Director of the Nebraska Department of Corrections.

6. Defendant ROBERT PARRATT is the Warden of the Nebraska Penal and Correctional Complex.

7. Defendant JACK CLEAVINGER, is the Director of the Department of Public Institutions.

8. Defendant KLAUS HARTMANN, M.D., is the Superintendent of the Lincoln Regional Center.

9. Defendant BENJAMIN COATES, M.D., is the head of the Security Building at the Lincoln Regional Center.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action pursuant to Rule 23 of the Federal Rule of Civil Procedure on behalf of all persons who have been transferred from the Nebraska Penal Complex to the Lincoln Regional Center Security Building, and all those persons who are presently subject to similar transfer pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

11. The class consists of a number of persons so numerous that joinder of all its members is impracticable. There are questions of law and fact common to the class. The position of the plaintiff as representative of the class is typical of the class. Plaintiff will fairly and adequately represent the class. Prosecution of separate actions by individual members of the class would result in inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the defendants. Adjudication with respect to individual members of the class would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

12. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

13. The questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of the controversy. Since there is no conflict among the interests of the members of the class, members have no interest in individually controlling the prosecution of separate actions. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it has the power to hear all the claims and to grant appropriate relief. There are not likely to be any difficulties in the management of a class action, since the whereabouts of all members of the class is known, and all members can easily be informed of this action.

STATEMENT OF FACTS

14. The Plaintiff, Charles Miller, was convicted in Douglas County, of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for one to three years, sentence to begin March 20, 1974. Plaintiff arrived at the Nebraska Penal Complex on March 25, 1974.

15. Plaintiff was transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, because he allegedly suffered from a mental disease or mental defect. Plaintiff, for the duration of his initial admission to the Nebraska Penal Complex, was given the routine physical examination, but received minimal or no psychiatric evaluation from a physician, psychologist or psychiatrist. Plaintiff's transfer to the Lincoln Regional Center, Security Building, came on or about May 31, 1974, without advance notice. He has been kept in custody at the Lincoln Regional Center, Security Building, continuously from his initial placement there until the time of the filing of this Complaint.

16. On numerous occasions, plaintiff has requested a transfer back to the Nebraska Penal Complex. In reply to such requests, plaintiff was either refused or received no reply. At no time has plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board for a *judicial* determination of his alleged mental illness. At no time did plaintiff ever receive a thorough psychiatric or psychological evaluation.

17. Plaintiff was transferred from the Nebraska Penal Complex according to the statutory procedure pursuant to Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971), as

is stated in the Department of Public Institutions "Request for Transfer", a copy of which is attached hereto as Exhibit "A", and incorporated herein by reference.

18. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

19. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

20. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to NEB. REV. STAT. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when a physician designated by the Department of Corrections may make a finding that a person committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to,

and for the care, custody and security of the person in such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

21. For the Causes of Action, plaintiffs incorporate paragraphs 1 through 20.

FIRST CAUSE OF ACTION

22. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the plaintiff and other class members without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

23. Neb. Rev. Stats. §§ 83-179,180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than plaintiffs are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate, or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

24. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts are unconstitutional on their face and as applied by the defendants, because the statutory procedure does not provide plaintiffs the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiffs Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

25. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts, are unconstitutional on their face and as applied by the defendants,

in that they create a *standard* by which plaintiffs may be transferred to the Lincoln Regional Center, Security Building, which is *vague* and *overbroad,* which violates the plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff on behalf of himself and all other persons similarly situated, prays that this Court:

1. Assume jurisdiction of this cause.

2. Declare that NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive plaintiff and the class he represents of their liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive plaintiff and the class he represents the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than plaintiffs, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive plaintiff and the class he represents the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiff's Due Process of Law in violating the Fourteenth Amendment to the United States Constitution.

D. Deprive plaintiff and the class he represents Due Process of Law in that plaintiffs may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overbroad, in violation of the Fourteenth Amendment to the United States Constitution.

3. That a preliminary and permanent injunction be issued, enjoining and restraining defendants from engaging in any of the unlawful acts, and practices complained of in this Complaint.

4. That the defendants be enjoined and restrained from detaining plaintiff or the members of the class he represents, in the Lincoln Regional Center, Security Building, so long as defendants continue to deprive them of their constitutional right to due process of law and the equal protection of the laws.

5. That the costs of this action be assessed against the defendants and that plaintiff be awarded reasonable attorney's fees.

6. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

CHARLES MILLER, Plaintiff

BY: /s/ Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.
800 Anderson Building
Lincoln, Nebraska 68508
(402) 435-2161

(Verification omitted.)

(Exhibit "A" omitted.)

(Title omitted in printing.)

ANSWER

Come now the defendants and for answer to the petition filed herein:

1. Admit that plaintiff is in the legal custody of the defendants by virtue of commitment to the Nebraska Penal and Correctional Complex by the District Court of Douglas County, Nebraska.

2. Sections 83-179 and 83-180, R. R. S. 1943, providing for the handling of a person found to be suffering from a physical or mental defect apply only to persons who are already in the legal custody of the Nebraska Penal and Correctional Complex by virtue of due process of law and are in no way comparable to the commitment of persons to mental institutions from the population at large.

3. That the petition fails to state grounds upon which relief may be granted.

4. That except as herein specifically admitted, the defendants deny each and every allegation in said petition.

JOSEPH VITEK, et al., Defendants
By PAUL L. DOUGLAS
Attorney General
By Mel Kammerlohr
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682
Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing)

JOINT STIPULATION OF FACTS

STIPULATION OF FACTS
By CHARLES MILLER, Plaintiff
and JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATES, Defendants

Come now the parties hereto, by and through their respective attorneys of record, and state and stipulate as follows:

1. Plaintiff Charles Miller is an 18 year old, black male resident of Lincoln, Nebraska. He is a United States citizen and a single person with no one dependent upon him for support. He was convicted in Douglas County of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for a period of one to three years. He began to serve his sentence March 20, 1974. He arrived at the Nebraska Penal Complex March 25, 1974.

2. Defendants are as follows:

A. Joseph Vitek is the Director of the Nebraska Department of Correctional Services.

B. Robert Parratt is the Warden of the Nebraska Penal and Correctional Complex.

C. Jack Cleavenger is the Director of the Department of Public Institutions.

D. Klaus Hartmann is the Superintendent of the Lincoln Regional Center.

E. Edwin A. Coates, M. D., is the head of the Security Building at the Lincoln Regional Center.

3. The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions. Its purpose is for the treatment of the emotionally disturbed, mentally ill, mentally diseased, and those suffering from mental defects.

4. All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal Complex and Nebraska State Reformatory to the Lincoln Regional Center are confined at the Security Building, Lincoln Regional Center, which is the institution's maximum security facility.

5. Plaintiff, Charles Miller, was involuntarily transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, where he was kept in custody continuously from his initial placement there until the time of the filing of this complaint.

Plaintiff, Charles Miller, was admitted to the Nebraska Penal Complex and involuntarily transferred from the Nebraska Penal Complex in accordance and compliance with the statutory procedure pursuant to Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

6. That at all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

7. Plaintiff, Charles Miller, on numerous occasions during the tenure of confinement at the Lincoln Regional

Center, Security Building, requested transfers back to the Nebraska Penal Complex.

8. Plaintiff, Charles Miller, has never been brought before a court of the State of Nebraska, nor a mental health commitment board for a judicial determination of the alleged mental illness.

9. Plaintiff, Charles Miller, after the filing of the motion for temporary restraining order herein on November 12, 1975, was transferred back to the Nebraska State Penal Complex, where he has been continually and is presently confined.

Dated this — day of March, 1976.

CHARLES MILLER, Plaintiff

By Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.
800 Anderson Building
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Tel: (402) 435-2161

Attorney for Plaintiff

JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER, KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATES, Defendants

By PAUL L. DOUGLAS
Attorney General

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Attorneys for Defendants

(Title omitted in printing.)

COMPLAINT OF INTERVENER

The intervening plaintiff, LARRY JONES, for his Complaint and cause of action, alleges and states as follows:

1. The intervening plaintiff is a twenty-two year old male, and a resident of Lancaster County, Nebraska.

2. The intervening plaintiff was convicted in Douglas County of Robbery and was sentenced to the Nebraska Penal and Correctional Complex for three to nine years. Intervening plaintiff arrived at the Nebraska Penal and Correctional Complex on May 31, 1974.

3. Intervening plaintiff was involuntarily transferred to the Lincoln Regional Center, Security Building, in April of 1975, because he allegedly suffered from a mental disease or mental defect. Said involuntary transfer came without advance notice. Intervening plaintiff has been kept in custody at the Lincoln Regional Center Security Building continuously from his initial placement there on or about April of 1975, until the time of the filing of this Complaint.

4. On numerous occasions intervening plaintiff requested a transfer back to the Nebraska Penal and Correctional Complex, and in reply to such requests received no reply. At no time has intervening plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board, for a *judicial* determination of his alleged mental illness.

5. Intervening plaintiff was involuntarily transferred from the Nebraska Penal and Correctional Complex to the

Lincoln Regional Center Security Building pursuant to Neb. Rev. Stats. §§83-179, 180 (Reissue 1971).

6. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971).

7. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

8. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to Neb. Rev. Stat. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to Neb. Rev. Stat. § 83-180 (Reissue 1971), when a physician designated by the Department

of Corrections may make a finding that a person committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to Neb. Rev. Stat. § 38-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in such hospital or psychiatric facility. While

receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

9. For the Causes of Action, intervening plaintiff incorporates paragraphs 1 through 8.

FIRST CAUSE OF ACTION

10. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the intervening plaintiff without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

11. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate, or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

12. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, because the statutory procedures do not provide intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

13. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, in that they create a standard by which intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building, which is vague and overbroad, which violates the intervening plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

REMEDIES AND RELIEF

WHEREFORE, intervening plaintiff prays that this Court:

1. Declare that Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, and as applied by defendants, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive intervening plaintiff of his liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive intervening plaintiff the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution;

D. Deprive intervening plaintiff Due Process of Law in that intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overbroad, in violation of the Fourteenth Amendment to the United States Constitution.

2. That the costs of this action be assessed against the defendants, and that plaintiff be awarded reasonable attorney's fees.

3. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

LARRY JONES, Intervening Plaintiff

By: /s/ Tom Wurtz
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Attorney for Intervening Plaintiff

(Verification omitted.)

(Title omitted in printing.)

ANSWER TO INTERVENOR LARRY JONES

Come now the defendants and generally deny each and every allegation in the complaint of the intervenor filed herein.

Further answering, defendants aver that the complaint fails to state a cause of action upon which relief may be granted.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By Mel Kammerlohr
Assistant Attorney General

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Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing.)

MOTION FOR SUMMARY JUDGMENT

Come now the defendants and respectfully move for a summary judgment herein for the reason that under any showing of facts within the purview of the pleadings filed herein the defendants would be entitled to judgment as a matter of law. The complaint fails to state a cause of action upon which relief may be granted and even a showing of disciplinary transfer (which is not pleaded) having a substantial adverse impact upon the prisoners would not violate any due process clause libery interest of the prisoners.

WHEREFORE defendants respectfully move the court for a summary judgment in favor of defendants and dismissing plaintiff's complaint.

JOSEPH VITEK, et al., Defendants
By PAUL L. DOUGLAS
Attorney General

By /s/ Melvin Kammerlohr
Melvin Kammerlohr
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Attorneys for Defendants

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MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

In this three-judge court action the plaintiffs, prisoners in the custody of the Department of Corrections of the State of Nebraska, challenge the Nebraska statutory scheme which allows state prisoners to be summarily transferred to a state mental hospital.

The defendants have filed a motion for summary judgment, filing 34. No affidavits or documents were submitted with the motion, except a brief discussing two recent United States Supreme Court cases. In *Meachum v. Fano,* 44 U.S.L.W. 5053, — U.S. — (June 25, 1976), the court held that the due process clause did not require a hearing for a state prisoner who was transferred from one state correctional institution to another. In the companion case to *Meachum, Montanye v. Haymes,* 44 U.S.

L.W. 5051, — U.S. — (June 25, 1976), the court held that no hearing was required whether or not the transfer resulted from the prisoner's misconduct or was disciplinary or punitive.

The plaintiffs have submitted affidavits and a brief in opposition to the motion for summary judgment. They argue that *Meachum* and *Montanye* do not apply to the transfer of prisoners from a correctional institution to a psychiatric one and that due process principles require procedural safeguards for such a transfer; that the process by which Nebraska prisoners are subjected to confinement and treatment in a mental hospital constitutes a denial of equal protection, because nominmates are accorded elaborate procedural protections before such confinement and treatment are allowed; and that the standard for commitment of prisoners is unconstitutionally vague and overbroad.

Because the pleadings, discovery documents, and affidavits on file fail to establish that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, see Rule 56 (c) of the Federal Rules of Civil Procedure, the motion will be denied.

The defendants' argument, based on the *Meachum* and *Montanye* cases, does not address the plaintiffs' claim that the transfer procedure denies equal protection and creates a standard which is vague and overbroad. The defendants are not entitled to a summary judgment on these issues.

As to the equal protection claim, the pleadings and the plaintiffs' affidavits establish as uncontested for the

purposes of this motion that the state has created one scheme for the psychiatric confinement and treatment of mentally ill prisoners and an entirely different one for the confinement and treatment of nonprisoners. On this record there is a genuine issue of material fact as to whether there is some basis for this unequal treatment. See generally, *Baxtrom v. Herold,* 383 U. S. 107 (1966).

With regard to the due process claim, it cannot be said that a summary judgment is in order, even if the two recent Supreme Court cases dealing with prisoner transfers are accepted as being as broad as the defendants argue in their brief. The complaints and affidavits of the plaintiffs are to the effect that (1) by reason of these transfers prisoners are subjected to compulsory psychiatric treatment which is not, at least in practice, authorized by reason of the criminal conviction, and (2) transfers are conditioned upon a finding that the prisoner has a mental disease or defect and cannot be given proper treatment in the prison. In this posture the case presents factual issues which are material to the limitations placed upon the express holdings in the *Meachum* and *Montanye* cases.

In the first place, the two Supreme Court cases apply only to actions which can be categorized as administrative in a broad sense[1] and which are authorized by virtue of

---

1 By this is meant actions which relate to the administration of the prison. No reference is here made to the distinction between transfers which are administrative and those that are punitive or disciplinary. See *Meachum v. Fano,* 44 U. S. L. W. at 5056, n. 6.

the state law governing the custody of prisoners and are not otherwise prohibited by constitutional considerations:

> " . . . [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and to subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . "

Meachum v. Fano, 44 U. S. L. W. at 5056.

The facts surrounding the essential nature of the transfers involved in the instant case still present a material issue bearing upon whether the transfers are of the same genre as those involved in *Meachum* and *Montanye.* Nothing submitted by the defendants or otherwise before the court establishes as uncontroverted the conclusion, proffered in the defendants' brief, that these transfers are mere administrative actions; to the contrary, the plaintiffs' characterization, adequately based upon the pleadings and affidavits, is that these transfers are in all respects commitments to the state mental hospital, which are factually no different than the commitments which have recently been subjected to severe due process restrictions. See *Doremus v. Farrell,* CV75-O-168 (U. S. D. C. Neb. December 23, 1975); *Lessard v. Schmidt,* 349 F. Supp. 1078 (U. S. D. C. Wis. 1972), vacated 421 U. S. 957 (1975). Cf. *O'Connor v. Donaldson,* 422 U. S. 563 (1975).

Similarly, it would not be appropriate for the court to hold the due process issue foreclosed where, as here, allegations of a state law and practice conditioning the

transfer upon established contingencies are at issue. The *Meachum* and *Montanye* cases did not go that far:

> "The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. . . . "
>
> *Meachum v. Fano,* 44 U. S. L. W. at 5054.

A further factual development is necessary before this court can properly determine whether the holdings in *Meachum* and *Montanye* vitiate the plaintiffs' due process claims in this case.

THEREFORE, IT HEREBY IS ORDERED that the defendants' motion for summary judgment, filing 34, is denied.

Dated August 17, 1976.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denny
United States District Judge

(Title omitted in printing.)

MOTION TO AMEND THE ORDER DENYING SUMMARY JUDGMENT

Come now the defendants and respectfully move the court to amend its order denying a summary judgment filed herein on August 24, 1976, to include the statement prescribed by § 28 U. S. C. 1292(b) that "in the opinion of the court such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" to enable defendants to request the United States Court of Appeals for the Eighth Circuit to permit an interlocutory appeal from said order as amended.

In making this motion defendants wish to emphasize that the issues involved in said motion for summary judgment and order denying the same are issues of first impression, they being based upon the two recent United States Supreme Court cases of *Meachum v. Fano,* 44 U. S. L. W. 53, — U. S. — (June 25, 1976) and *Meachum, Montanye v. Haymes,* 44 U. S. L. W. 50-51, — U. S. — (June 25, 1976), they also being cases of first impression.

Respectfully submitted,

JOSEPH VITEK, et al., Defendants
By PAUL L. DOUGLAS
Attorney General

By /s/ Mel Kammerlohr
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Attorneys for Defendants

NOTATION AS TO LOCATION OF THE DECISION AND ORDERS IN QUESTION

The Judgment, Memorandum of Decision and Order appealed from of the Three-Judge Court of the United States District Court for the District of Nebraska is set forth in the Jurisdictional Statement contained in the Appendix pages 1 through 18 thereof.

Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION

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TABLE OF CONTENTS

	Pages
Motion to Affirm	1
State Statute and Nature of the Case	2
Argument	3
Conclusion	5

CASES CITED

Baxstrom v. Herold, 383 U. S. 107 (1966)	4
Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977)	4
Matthews v. Eldridge, 424 U. S. 319 (1976)	3
Meachum v. Fano, 427 U. S. 215 (1976)	4
Montayne v. Haymes, 427 U. S. 236 (1976)	4
Morrissey v. Brewer, 408 U. S. 471 (1972)	4
Schuster v. Herold, 410 F. 2d 1071 (1969)	4

STATUTES CITED

Neb. Rev. Stat. § 83-180 (1) (Reissue 1976)	2

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment	2, 3

In The

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Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

MOTION TO AFFIRM

The Appellee moves the Court to affirm the judgment of the court below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the constitutionality of Neb. Rev. Stat. § 83-180 (1) (Reissue 1976) as applied to the plaintiff-intervenor Larry D. Jones.

The statute provides for the involuntary transfers of persons sentenced to the Department of Correctional Services to a term of years, to the Lincoln Regional Center, a mental hospital, not within the Department of Correctional Services, but within Department of Public Institutions. The statute provides for such involuntary transfers without any formal notice or hearing or any other safeguard, other than determinations by one or more psychiatrists that the persons suffer from a mental disease or defect, and could not be given proper treatment within the Department of Correctional Services.

The appellants have appealed from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring Neb. Rev. Stat. § 83-180 (1) to be unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

———o———

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The Fourteenth Amendment to the Constitution of the United States forbids any state to "deprive any person of . . . liberty . . . without due process of law."

The court below, in recognizing that due process is a flexible concept, chose to use the analytical framework set out by this Court in the case of *Matthews v. Eldridge,* 424 U. S. 319, 334-335 (1976) which suggested:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg v. Kelly, supra,* at 263-271."

The court below closely evaluated plaintiff's private interest of his avoidance of being stigmatized and labeled mentally ill, and his avoidance of a more controlled confinement, which would include behavior modification through the use of drugs. The court felt the risk of an erroneous deprivation of these private interests to be high. After balancing these and the state's interest the court merely made a factual determination that the involuntary transfer in question was tantamount to a major

change in the plaintiff's condition of confinement which amounted to a grievous loss. Due process therefore attached to the plaintiff's liberty interest.

Minimal due process requirements were then ordered by the court below based upon the case of *Morrissey v. Brewer,* 408 U. S. 471 (1972), which involved an analagous parole revocation. Availability of counsel was also deemed necessary by the court because of the disabilities which accompany the mentally ill.

The opinion of the court below merely followed the direction of this Court as set down by its earlier decisions.

Counsel for the appellant has argued that the court below was bound by the holdings of *Meachum v. Fano,* 427 U. S. 215 (1976) and *Montayne v. Haymes,* 427 U. S. 236 (1976). These cases are clearly inapplicable to the case at hand as they dealt with involuntary transfers from one prison to another, and did not treat the issue of the constitutionality of an involuntary transfer from a state prison to a state mental hospital. Even if the cases are remotely applicable, the case at hand clearly comes within the exception noted in *Meachum, supra.*

The thrust of the opinion below is also consistent with the opinions set forth in:

Baxstrom v. Herold, 383 U. S. 107 (1966).

U. S. ex rel. Schuster v. Herold, 410 F. 2d 1071 (2nd Cir. 1969).

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977).

even though the similar issues were resolved through an equal protection analysis.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to affirm the judgment entered in the cause by the United States District Court for the District of Nebraska.

Respectfully submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

BRIEF OF THE APPELLANTS

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TABLE OF CONTENTS

	Pages
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented for Review	10
Statement of the Case	10
Summary of the Argument	14
Argument:	
I. The only conditions for transfer, if any, in the statute in question, are the findings to be made by the physician or psychologist.	17
II. The responsibility for the determination of the need for medical care is properly placed in health care professionals.	21
Conclusion	30

CASES CITED

Baxtrom v. Herold, 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 ..... 29, 30

Cooper v. Pate, 378 U. S. 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733 27

Enomoto v. Wright (Aff. w/o opinion February 21, 1978, — U. S. —, U. S. L. W. 3513) 20

Gagnon v. Scarpelli, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 ..... 18, 19, 28

CASES CITED—Continued

Pages

Humphrey v. Cady, 405 U. S. 504, 31 L. Ed. 2d 394, 92 S. Ct. 1048 ..... 29, 30

Meachum v. Fano, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 ..... 14, 15, 17, 18, 20, 21, 22

Montanye v. Haymes, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 ..... 14, 15, 17, 18, 20, 21

Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 ..... 13, 18, 19, 28

Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 ..... 13, 18, 19, 20, 28

STATUTES CITED

28 U. S. C. § 1253 2

28 U. S. C. § 1343 (3) and (4) 1, 10

28 U. S. C. § 2201 ..... 2, 10

28 U. S. C. § 2202 ..... 2, 10

28 U. S. C. § 2281, repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 2

42 U. S. C. § 1983 ..... 1, 10

Neb. Rev. Stat. § 81-101 (Reissue 1976) 8, 11

Neb. Rev. Stat. § 81-102 (Reissue 1976) 8, 11

Neb. Rev. Stat. § 83-173 (Reissue 1976) 4, 12

Neb. Rev. Stat. § 83-176 (Reissue 1976) 5, 12

STATUTES CITED—Continued

Pages

Neb. Rev. Stat. § 83-179 (Reissue 1976) 6, 13

Neb. Rev. Stat. § 83-180 (Reissue 1976) 2, 7, 12, 13, 14, 15, 21, 26, 30

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment 2, 10

TEXTS CITED

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 11.5 ..... 23, 24

Commission on Accreditation for Corrections of the American Correctional Assoc., *Manual of Standards for Adult Correctional Institutions*, August 1977, Standards for Medical and Health Care Services nos. 4275 and 4277 ..... 24, 25

In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

BRIEF OF THE APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3) and (4), and 28

U. S. C. §§ 2201 and 2202 declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U. S. C. § 2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U. S. C. § 1253.

Notice of Appeal was filed in the United States District Court for the District of Nebraska on October 21, 1977, to the final judgment sought to be reviewed entered October 14, 1977.

Appeal was docketed in the United States Supreme Court on December 20, 1977. Probable jurisdiction was noted February 21, 1978.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Fourteenth Amendment

[ARTICLE XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts

incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(2) Neb. Rev. Stat. § 83-173 (Reissue 1976)

The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department, sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

(3) Neb. Rev. Stat. § 83-176 (Reissue 1976)

(1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

(4) Neb. Rev. Stat. § 83-179 (Reissue 1976)

Upon his initial admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation. He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

(5) Neb. Rev. Stat. § 83-180 (Reissue 1976)

(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

(6) Neb. Rev. Stat. § 81-101 (Reissue 1976)

The civil administration of the laws of the state is vested in the Governor. For the purpose of aiding the Governor in the execution and administration of the laws, the executive and administrative work shall be divided into the following departments: (1) Department of Agriculture; (2) Department of Labor; (3) Department of Health; (4) Department of Roads; (5) Department of Water Resources; (6) Department of Banking and Finance; (7) Department of Insurance; (8) Department of Motor Vehicles; (9) Department of Public Welfare; (10) Department of Public Institutions; (11) Department of Administrative Services; (12) Department of Economic Development; and (13) Department of Correctional Services.

(7) Neb. Rev. Stat. § 81-102 (Reissue 1976)

The Governor shall appoint heads for the various departments, subject to confirmation by a majority vote of the members elected to the Legislature. Such appointments shall be submitted to the Legislature within sixty calendar days following the first Thursday after the first Tuesday in each odd-numbered year. The officers shall be designated as follows: (1) The Director of Agriculture for the Department of Agriculture; (2) the Commissioner of Labor for the Department of Labor; (3) the members of the State

Board of Health for the Department of Health; (4) the Director-State Engineer for the Department of Roads; (5) the Director of Water Resources for the Department of Water Resources; (6) the Director of Banking and Finance for the Department of Banking and Finance; (7) the Director of Insurance for the Department of Insurance; (8) the Director of Motor Vehicles for the Department of Motor Vehicles; (9) the Director of Public Welfare for the Department of Public Welfare; (10) the Director of Public Institutions for the Department of Public Institutions; (11) the Director of Administrative Services for the Department of Administrative Services; (12) the Director of Correctional Services for the Department of Correctional Services; and (13) the Director of Economic Development for the Department of Economic Development. Whoever shall be so nominated by the Governor and shall fail to receive the number of votes requisite for confirmation, shall not be subject to nomination or appointment for this or any other appointive state office requiring confirmation by the Legislature during the period for which his appointment was sought. In case of a vacancy in any of such offices during the recess of the Legislature, the Governor shall make a temporary appointment until the next meeting of the Legislature, when he shall nominate some person to fill such office. Any person so nominated who is confirmed by the Legislature, shall hold his office during the remainder of the term if a specific term has been provided by law, otherwise during the pleasure of the Governor subject to the provisions of this section; *Provided*, any such officers may be removed by the Governor pursuant to Article IV of the Constitution of Nebraska.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

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STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343(3) and (4), 28 U. S. C. § 2201 and 28 U. S. C. § 2202, in which Larry D. Jones intervened. It was decided by a three-judge court by judgment entered on October 14, 1977, pursuant to a Memorandum of Decision and order entered on September 12, 1977. The issues were found to be moot as to the plaintiffs other than Jones.

Prior to that, on August 2, 1976, defendants filed a motion for summary judgment (A. 25), which was denied by the court on August 24, 1976 (A. 26). Defendants' request for amendment of the order to permit an interlocutory appeal was denied (A. 31).

Plaintiff-intervenor, Larry D. Jones (appellee), was convicted of the crime of robbery and sentenced to the Department of Correctional Services of the State of Nebraska for a term of three to nine years from the District Court of Douglas County, Nebraska, which he commenced serving at the Nebraska Penal and Correctional Complex on or about May, 1974 (R. 73). He first began to serve his sentence by assignment to the reception-diagnostic center behind the walls of the Nebraska Penal Complex for a period of 30 days (R. 73). After that he went to the reformatory where he remained from June of 1974 to January of 1975 (R. 73, 74). He was then transferred to the Penal Complex penitentiary hospital and two days later to the adjustment center of the Nebraska Penal Complex. While there, he set his mattress on fire and was badly burned. He was transferred from the Nebraska Penal Complex by ambulance to St. Elizabeth's Hospital, burn unit, a hospital in the City of Lincoln, where he remained for about four or five months (R. 75, 112, 113). From the St. Elizabeth's Hospital he was involuntarily transferred after findings by physicians in compliance with Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra*, to the security unit of the Lincoln Regional Center (R. 76-78). The Lincoln Regional Center is under the Department of Public Institutions while the Nebraska Penal Complex is under the Department of Correctional Services. Both are executive departments of the State of Nebraska (Neb. Rev. Stat. § 81-101 (Reissue 1976)). The directors of both departments are appointed by the Governor of the State of Nebraska (R. 58), (Neb. Rev. Stat. § 81-102 (Reissue 1976)).

Neb. Rev. Stat. § 83-180 (Reissue 1976), provides in part that if the physician or psychologist designated by the Director of Correctional Services finds that a person suffering from a mental disease or defect cannot be given proper treatment in a facility of the department, the director may arrange for his transfer for examination, study and treatment to any medical correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to expiration of his sentence, treatment in such facility is no longer necessary.

In addition to Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra,* other statutes of Nebraska also provide that:

(1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (Neb. Rev. Stat. § 83-173 (Reissue 1976)).

(2) Whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (Neb. Rev. Stat. § 83-176 (Reissue 1976)).

(3) Upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation, including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (Neb. Rev. Stat. § 83-179 (Reissue 1976)).

The said Larry D. Jones intervened in the present action alleging that Neb. Rev. Stat. § 83-179 (Reissue 1976) and Neb. Rev. Stat. § 83-180 (Reissue 1976), *supra,* are unconstitutional on their face and as applied by the defendants because, among other things, they deprive intervening plaintiff of due process of law in violation of the Fourteenth Amendment to the United States Constitution (A. 23).

That the conditions of confinement or the facilities of the Lincoln Regional Center security unit, or any other facilities here involved, were in themselves unconstitutional has never been an issue in this case nor been so determined. The three judge court however, decreed:

> That Neb. Rev. Stat. § 83-180(1) (Reissue 1976), *supra,* is unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law; that defendants (appellants) are enjoined from transferring plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal charge he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes substantially the same elements as provided by this court in *Morrissey v. Brewer,* 408 U. S. 472 (1972), and *Wolff v. McDonnell,* 418 U. S. 539 (1974), except for the addi-

tion that the state must also furnish legal counsel if the inmate is financially unable to furnish his own and the state must give effective and timely notice of all the foregoing rights. (Jurisdictional Statement, App. 1-4).

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SUMMARY OF THE ARGUMENT

I.

The three-judge court found the transfers to come within an exception to *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 543, because of a state statute which it said gave the inmate a reasonable expectation that he would not be transferred "except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex." (Memorandum of Decision, Jurisdictional Statement, App. 4, 7).

The statute did not so state. The statute states, in this regard, "If the physician or psychologist is of the opinion that the person (found by the physician or psychologist to suffer a mental disease or defect) cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study and treatment. . . . " Neb. Rev. Stat. § 83-180 (Reissue 1976).

There was never any claim that the statute was not followed. Therefore, any right the inmate had by virtue of the statute was given to him.

The court did not find that the transfer was not within the prison system or that the conditions to which plaintiffs were transferred were otherwise unconstitutional.

Therefore, the exception or "specified conditions" of *Meachum* and *Montanye* were not alleged to have been violated leaving the transfers within the holdings of those cases. The defendants motion for summary judgment should therefore have been sustained.

The situation here is different in two respects from this court's holdings in other cases that a due process proceeding was necessary before a state conferred right could be removed.

1. The method of determining the facts upon which removal of the right hinged was left open when the state conferred the right in those cases; here it was not.

2. The method of determining misconduct—the trigger in those cases, should logically be different from the method of determining the availability and need for examination, study and treatment of mental illness.

II.

The examination, study and diagnosis of illnesses, whether mental or physical, are an integral part of prison life and the transfer from a prison to a mental hospital should be treated the same as transfers between correctional institutions in *Meachum v. Fano* and *Montanye v. Haymes.* Because of the Nebraska statute, Neb. Rev. Stat. § 83-180 (Reissue 1976), the officials do not have absolute discretion to make such transfers as in *Meachum* and *Montayne.* However, because of the nature of the determina-

tion to be made, that a transfer, if made, is for examination and study as well as treatment, the provision of the statute placing the responsibility upon a health care professional to make the determination whether the inmate can be given proper treatment where he is or should be transferred for examination, study and treatment is reasonable and proper. If the district court, by setting up its own procedures, was in effect holding that the Nebraska statutory method was improper, we vigorously disagree.

Because of the great variety of both physical and mental health services throughout the United States as to the availability, quality and other considerations and the expertise necessary in diagnosis and selection, the provision in the Nebraska statute for placing the responsibility for the initial determination is not unreasonably placed in the hands of the health care professional.

The type of due process hearing which is proper for determining misconduct is ill-suited, cumbersome, time-consuming and expensive for the determination of whether an inmate should be moved for further study and diagnosis for mental illness or related medical problems.

If problems arise in regard to the programs or services received, they can more directly and logically be attacked by an action to test the constitutionality of the conditions and to seek suitable relief rather than a blanket procedure which has no relationship to the quality or type of programs involved or available in various parts of the country.

The Nebraska statute in question specifically provides for the use of the civil procedures applicable to all citizens if an inmate is to be placed in a mental institution

after the expiration of his prison sentence and thus no equal protection issue is involved.

ARGUMENT

I.

The only conditions for transfer, if any, in the statute in question are the findings to be made by the physician or psychologist.

The three-judge court in the present case founded its decision that process was due on its interpretation of the Nebraska statute which it held to be unconstitutional and its finding that the prison penal authorities followed this statute.

The three-judge court began by quoting from *Montanye v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543, the following:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other *specified events.*" (Emphasis added.)

The three-judge court then distinguished the Nebraska statute on transfers to the Lincoln Regional Center concluding that:

> " . . . , there was an objective expectation, firmly fixed in state law and official Penal Complex practice,

> that a transfer would not occur except when the inmate suffers from a mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . . " (Jurisdictional Statement, App. 7-8).

The three-judge court ignored the fact that the statute and the practice thereunder required the findings to be made by a physician or psychologist designated by the director and not by some unnamed person or body. Therefore, the inmate, instead of having a justifiable expectation rooted in state law that he will not be transferred, as stated by the district court, clearly had an expectation that he may be transferred if the physician or psychologist, not some unnamed person or body, found that he suffered from a mental disease or defect not properly treatable in the facility he was presently in.

There is just no logical way that it can be said that a Nebraska penal inmate has an objective expectation that a transfer would not occur until after a due process hearing when the statute specifically states that a transfer may occur when the stated findings are made by a physician or psychologist—clearly the "specified events" when he may expect to be transferred as stated in the quote above from *Meachum*.

Nor is the situation here in any way akin, so far as taking away a due process clause liberty interest, to *Morrissey v. Brewer*, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (parole), *Gagnon v. Scarpelli*, 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (probation), or *Wolff v. McDonnell*, 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (good time), all of which were based upon the taking away of a positive grant of liberty affirmatively conferred by state law. The liberty interests, unlike *Meachum* and *Montanye* were

not extinguished by the conviction but acquired independently thereof. In *Morrissey v. Brewer* this court found that:

> " . . . Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. . . . " *Morrissey v. Brewer*, 408 U. S. 471 at 482.

No similar comparison could be made in this case.

In *Gagnon v. Scarpelli* this court could not perceive any relevant differences to the guarantee of due process between the revocation of parole and the revocation of probation and found that:

> " . . . Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. . . ." *Gagnon v. Scarpelli*, 411 U. S. 778 at 782.

In *Wolff v. McDonnell* the statutory grant of good time credit was found to be a liberty interest with real substance which the Nebraska statute specifically provided could not be taken away except in cases of flagrant or serious misconduct—thus a liberty interest firmly grounded in state law. The statute did not provide how the factual finding as to serious misconduct would be made, hence the due process hearing. Had the statute provided a fact finding procedure, the court might have concluded that no further process was due; in any case, as argued infra, there is a significant difference between the qualifi-

cations desirable for ascertainment of medical facts as opposed to the facts of misconduct.

The distinction, between the *Meachum-Montanye* transfers on the one side, and the part of *Wolff v. McDonnell* relating to disciplinary cells and the recent case of *Enomoto v. Wright* (Aff. w/o opinion February 21, 1978, — U. S. —, U. S. L. W. 3513), regarding administrative segregation, on the other side, is not as fine as may appear at first reading.

In both *Meachum* and *Montanye* this court emphasized that where the prison officials had discretion to transfer within the system, or could transfer for no reason at all, that the due process clause was not triggered even if the transfer was for disciplinary purposes or labeled as punitive. However, in both *Wolff v. McDonnell* and *Enomoto v. Wright*, the transfer could only be made for specific grounds set forth in a state statute or state administrative rule. In *Wolff* the same statute relating to revocation of good time applied to placement in a disciplinary cell, i. e. only for flagrant or serious misconduct. In *Enomoto* the administrative segregation could only be made for medical, psychiatric, disciplinary or administrative reasons which had to be clearly documented at the time the action was taken. Thus in both the latter two cases there were factual determinations required before the transfer and the method of determining the factual requirements was left open by the state law conferring the right.

Appellants in the present case could reasonably argue that other Nebraska statutes give the Director of Corrections the discretion to transfer to a mental hospital for no reason at all and that therefore, even if the statute in

question requires the findings therein set forth that the director is not limited thereby. However, we do not wish, nor do we feel it is necessary, to place the transfer on such a narrow ground. We are willing to place the transfer upon the findings required by the section in question; our only difference with the three-judge court is that the statute (and therefore any right of the inmate which is grounded in state law) ties the findings to the physician or psychologist and that such a procedure, as argued later, is reasonable and proper. That any right the inmate has because of such statute is clearly stated and conferred and cannot be separated; that the three judge court erred in changing that right from requiring the necessary findings to be made by the physician or the psychiatrist to such findings being required to be made by court designated procedures. (The district court did not hold that the mental hospital was not part of the penal system. Memorandum of Decision, Jurisdictional Statement, App. 7.)

Accordingly, since the complaints herein (A. 3, A. 18) only claim that the statute, section 83-180, *supra*, is unconstitutional on its face and that defendants followed this statute in practice, the motion for summary judgment (A. 25) filed by the defendants should have been sustained.

II.

The responsibility for the determination of the need for medical care is properly placed in health care professionals.

The only discernible difference between the present case (besides the necessary physician or psychologist findings) and *Meachum* and *Montanye* is that the transfer

in the present case was to a state mental hospital authorized for use by the state correctional statutes, while in the foregoing cases the transfers were to nonhospital correctional facilities. Appellants respectfully contend that this is a difference without legal substance so long as the hospital facilities are not otherwise violative of the Constitution and are within the state system contemplated by the criminal sentence.

Apparently the district court agreed that there was no legal significance in the difference in facilities, stating in its memorandum of decision:

> "The plaintiffs here were not transferred from one 'prison' to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes. . . . " (Jurisdictional Statement, App. 7).

In *Meachum v. Fano*, 427 U. S. 215 at 224, 49 L. Ed. 2d 451, 96 S. Ct. 2532, this court clearly set out the reasons underlying the constitutionality of transfers by emphasizing that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the constitution." In the same case the court went on to point out that the Constitution does not guarantee that a convicted prisoner will be placed in any one particular prison if the state has more than one correctional institution; that the conviction has sufficiently extinguished the defendant's liberty interest to empower the state to confine

him in any of its prisons or to transfer him from one institution to another within the state prison system.

So far as we know, neither this court nor any recognized authority on corrections, has ever stated that a prison or correctional facility must or must not have hospital or medical facilities including mental health facilities at any particular location. (Appellee Jones while in the Nebraska Penal and Correctional Complex received medical treatment from a psychiatrist while he was in the reformatory unit (R. 79), and at the prison hospital in the penitentiary unit (R. 99), which housed both psychiatric and medical patients (R. 157), and treatment for burns at St. Elizabeth's Hospital in Lincoln (R. 75) before he was transferred to the mental hospital.)

We assume that the programs available in the various correctional institutions throughout the United States are considerably varied in kind and degree. Undoubtedly some offer more in the way of recreational, manual training, or academic programs than others. Probably some provide relatively complete medical services within the institution while others must contract with outside physicians and hospitals for all or nearly all. The same as to availability and variety of programs is undoubtedly true as to mental health facilities.

The National Advisory Commission on Criminal Justice Standards and Goals in its volume, *Corrections*, released in 1973, in discussing these problems, stated in part as follows:

> "3. Each correctional agency should provide for the psychiatric treatment of emotionally disturbed offenders. Psychotic offenders should be transferred

to mental health facilities. Correctional institution treatment of the emotionally disturbed should be under the supervision and direction of psychiatrists."

The commentary thereof provides in part:

"As psychiatric services for diagnostic purposes became available in some correctional systems, the response of the correctional systems was to transfer the most seriously disturbed offenders to mental institutions. This decision was motivated by the fact that a large proportion of highly disturbed offenders were prone to violent and destructive behavior and highly oriented toward escape. However, as State mental hospitals developed 'open institutions,' they began to discourage admission of disturbed offenders for whom more secure facilities were required. . . .

". . . . .

"The correctional institution should not attempt to treat the psychotic but must persist in efforts to persuade mental health agencies to accept him for care and treatment. . . . " Standard 11.5 of the National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 374, 376.

More recently, in August, 1977, the Commission on Accreditation for corrections of the American Correctional Association has published its *Manual of Standards for Adult Correctional Institutions.* The manual states that the commission not only promotes voluntary participation of correctional administrators and personnel in the accreditation process but also awards accreditation to correctional agencies and systems that demonstrate adherence to approved standards; the Commission on Accreditation will award accreditation to correctional systems for three or five years depending upon the extent of compliance with the standards.

In the section of Standards for Medical and Health Care Services is the following:

"**4277 Written policy specifies that appropriate facilities are available for inmates who are diagnosed by qualified psychiatrists or psychologists as severely psychotic. (Essential)**

"DISCUSSION: Psychotic inmates should be transferred to mental health institutions. However, many state mental hospitals are becoming more open and are resisting the admission of disturbed inmates for whom secure housing is required. Partly in response to this, state correctional systems have begun to develop their own psychiatric facilities. Whatever system prevails, psychotic inmates should be transferred to a facility that can treat them effectively and assure public safety. These facilities must be under the supervision of mental health personnel and operated according to the standards and procedures of the psychiatric field."

As to emotionally disturbed inmates, Standard 4275 recognizes that emotionally disturbed inmates may be violent or destructive or prone to escape. It recommends that severely psychotic inmates should be transferred to state hospitals and less disturbed inmates should be retained in the general population where possible, provided treatment programs supervised by competent mental health professionals utilizing the least coercion necessary are available.

The foregoing standards and recommendations clearly demonstrate that treatment for mental and emotional problems is a vital part of a prison. They also illustrate the futility and inappropriateness of requiring a due process hearing before a transfer for mental health services

when no such hearing is required when the services are provided at the inmate's location. Enlarge the problem by including other logical health services and the impropriety of such a requirement becomes even more obvious. Such a weighted preference for in-house care ignoring completely the availability and quality of services as criteria would avail no one. Whether the question is the advisability of surgery for a brain tumor, chemotherapy for cancer or treatment for mental illness, one of the main questions of the patient would be the same in each case—whether such treatment is necessary and proper? The inmate is entitled to reasonable medical diagnosis in such regard and the Nebraska statute in question, section 83-180, makes specific provision for this interest. The section provides in part:

> ". . . If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for *examination, study, and treatment* to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. . . ." (Emphasis added.)

The last sentence of said section further provides that the inmate shall be returned when "treatment in such facility is no longer necessary." We can't assume that the doctors making such examination and study will provide unnecessary treatment and that they will not comply with the statute and fail to return the inmate when treatment is no longer necessary. This is the same standard we would expect for an inmate sent into a private hospital for a brain tumor or cancer diagnosis and treatment. As mentioned above, most persons would undoubtedly agree

that the inmates' interests in such regard are better protected in most cases if he is transferred for another opinion before treatment is undertaken than if treatment is given, for any of the above examples, right in the prison. At any rate, it cannot be said that it is any worse. Logically, whether or not the inmate has had a hearing before a lay board or not should not make any difference to the examining doctors on the receiving end in their determination as to what treatment, if any, is necessary.

In addition to the foregoing, considering that all inmates have a constitutional right to reasonable medical treatment, including mental health treatment, and the need to maintain order in the prisons, overburdensome procedures which could conceivably constitute roadblocks in their receiving treatment should not be instituted either. The opportunity for the best consultation as to the need and kind of medical services available should remain the prime objective and the use of professionals for referral to more professionals would seem to be a logical and reasonable accommodation to all interests.

Of course, it could be argued that absent any statute the right not to have mental health treatment, except when disturbance to other inmates and dangers to security are involved, is one of those residuums of liberty not extinguished by the due process conviction and sentence such as substantial religious freedom. *Cooper v. Pate,* 378 U. S. 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733 (1964). However, such an approach does not logically distinguish between the examples mentioned above such as a right not to receive cancer treatment or serious surgery. Even if there is considered to be such a residuum, the initial deci-

sion to refer a patient for study and examination to see whether or not such treatment should be received is nevertheless better handled for all interests concerned by a medical health professional than by a proceeding before a lay committee.

In this regard we must strenuously disagree with the three judge court in its Memorandum of Decision contained in the Jurisdictional Statement, App. 4, at App. 9, where it sets forth how it arrived at the procedures it deemed required. While the court recognized that "the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy . . ." the court did nothing to follow through on this. The procedures for fact finding relating to violations, whether it be for revocation of parole, of probation, or good time, or for placement in a disciplinary cell, are particularly ill-suited to the question of transfer for medical or mental health reasons. The latter, requiring as they must, expert opinion evidence, the investment in time, expense and inconvenience in preparing for and conducting such hearings would seem to be way out of proportion to the result to be obtained when compared with the methods already suggested. The requirement by the district court wholly without precedent of appointment of legal counsel when an inmate is financially unable, in excess of the requirements of *Morrissey, Gagnon* and *Wolff*, dramatically illustrates the increase in money and activity which may be expected. It would seem that the emphasis should be upon the constitutionality of the conditions to which an inmate is to be subject, whether in a physical or mental health situation, rather than upon the

procedures to place him there. An inmate, of course, retains his right to bring a civil rights action for unconstitutional conditions, for reasonable medical services and, under the Nebraska statute in question, to require transfer back to the correctional institution when treatment is no longer necessary.

As mentioned earlier, when the entire spectrum of mental health facilities in this country is considered, the emphasis upon the pre-transfer procedure rather than upon the constitutionality of the conditions either before or after a proposed transfer would appear to miss the mark in most cases.

Equal Protection Considerations.

Although the district court alluded to possible equal protection problems mentioning *Baxtrom v. Herold,* 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760, we do not believe that said case is any authority or precedent to the present situation. As this court well knows, that case related to the procedures for the commitment of a prison inmate to a mental institution after his prison term expired. In *Humphrey v. Cady,* 405 U. S. 504, 31 L. Ed. 2d 394, 92 S. Ct. 1048, this court followed the *Baxtrom v. Herold* reasoning by holding that it applied to a claim that a five-year renewal of a sex deviate commitment after the expiration of his one-year maximum sentence stated a cause of action. In that same case this court emphasized:

> "Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require

the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence. . . ." *Humphrey v. Cady,* 405 U. S. 504 at 510, 511.

The problem raised in both *Baxtrom v. Herold* and *Humphrey v. Cady,* as to equal protection after the expiration of a prison sentence is specifically taken care of in the statute in question, § 83-180 (3), *supra,* which provides:

> "When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the *civil commitment* and detention of persons suffering from such disease or defect." (Emphasis added.)

CONCLUSION

The appellants respectfully submit that Neb. Rev. Stat. § 83-180 (Reissue 1976), is a reasonable, proper and constitutional method of determining whether or not prison inmates should receive further examination, study and treatment in the location in which they are or another correctional facility housing medical services, or to another institution in the Department of Public Institutions

where proper treatment is available; the district court found that the officials followed this statute. Appellants therefore respectfully submit that any constitutional right that appellee Jones may have had which was not extinguished by his conviction and sentence, whether by virtue of § 83-180 or as a residuum retained, was satisfied by the findings of the professionals as required by said statute and that therefore appellants' motion for summary judgment should have been sustained. Appellants respectfully pray that the three judge district court for the District of Nebraska be reversed and the case remanded with instructions to enter an order sustaining the appellants' motion for summary judgment and dismissing the complaint of appellee Jones.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-888

JOSEPH VITEK, *etc., et al.*,

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v.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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TABLE OF CONTENTS

Page

OPINION BELOW 1

ADDITIONAL STATUTES INVOLVED 2

QUESTIONS PRESENTED FOR REVIEW 7

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 11

ARGUMENT:

I. AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER 15

II. A PRISONER HAS A PROTECTED LIBERTY INTEREST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS 24

III. AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS 37

CONCLUSION 41

TABLE OF AUTHORITIES

Cases:

Baxstrom v. Herold, 383 U.S. 107 (1966) ..... *passim*

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1974).....13,14,20,27,41
Doremus v. Farrell, 407 F. Supp. 509 (U.S.D.C. Neb. 1975).....19
Drope v. Missouri, 420 U.S. 162 (1975).....32
Enomoto v. Wright (Aff. w/o opinion February 21, 1978, ___ U.S. ___ , U.S.L.W. 3513).....22
Gagnon v. Scarpelli, 411 U.S. 778 (1973).....21
Goldberg v. Kelly, 397 U.S. 254 (1970).....22
Greenwood v. U.S., 350 U.S. 366 (1956).....32
Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).....39
In Re Ballay, 482 F.2d 648 (D.C. Cir. 1973).....28
In Re Gault, 387 U.S. 1 (1967).....25,39
Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972).....39
Matthews v. Eldridge, 424 U.S. 319 (1976).....13,22
Matthews v. Hardy, 420 F.2d 607 (1969).....20,27,41
Meachum v. Fano, 427 U.S. 215 (1976)..... *passim*
Montanye v. Haymes, 427 U.S. 236 (1976).... 12,16,18,22
Morrissey v. Brewer, 408 U.S. 471 (1972).....21,25,38
O'Connor v. Donaldson, 422 U.S. 563 (1975).....13-14,25,32
Specht v. Patterson, 386 U.S. 605 (1967).....25
U.S. ex. rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1969)..... *passim*
Wolff v. McDonnell, 418 U.S. 539 (1974).....21,22,24,38

Statutes Cited:

Mass. Gen. L. Annot. 97 (1974).....17
Neb. Rev. Stats. §§81-101-102 (Reissue 1976).....9

Neb. Rev. Stat. §83-180 (Reissue 1976)..... 8,12,19,25,36
Neb. Rev. Stat. §83-173 (Reissue 1976).....10
Neb. Rev. Stat. §83-176 (Reissue 1976).....10,19,25
Neb. Rev. Stats. §§83-1001-1078 (Cum. Supp. 1976)..... 2,19,40,41

Constitution Cited:

Constitution of the United States, Fourteenth Amendment 8,24

Texts Cited:

Commission on Accreditation for Corrections of the American Correctional Assoc., *Manual of Standards for Adult Correctional Institutions*, August 1977, Standards for Medical and Health Care Services nos. 4275 and 4277 33
Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974) 32
National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.13, 16.12 14,34,35,36

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OPINION BELOW

The opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569 (1977).

ADDITIONAL STATUTES INVOLVED

The Nebraska Mental Health Commitment Act
Neb. Rev. Stats. §§83-1001-1078 (Cum. Supp. 1976)

83-1001. Declaration of purposes.
83-1002. Sections; terms defined.
83-1003. County attorney; defined.
83-1004. Mental health board; defined.
83-1005. Director; defined.
83-1006. Mental health center; defined.
83-1007. State hospital; defined.
83-1008. Indigent; defined.
83-1009. Mentally ill dangerous person; defined.
83-1010. Mental health professional; defined.
83-1011. Peace officer; defined.
83-1012. Petitioner; defined.
83-1013. Sheriff; defined.
83-1014. Subject; defined.
83-1015. Jail; defined.
83-1016. Clerk of the district court; duties relating to mental health board.
83-1017. Mental health board for each county; created; powers.
83-1018. Mental health board; members; terms; qualifications; vacancy; alternate members; quorum; chairperson.
83-1019. Facility or programs for treatment of mental illness; voluntary admission; unconditional discharge; exception.
83-1020. Mentally ill dangerous person; custody prior to mental health board proceedings; where detained.

83-1021. Individual taken into custody; peace officer; execute certificate; contents.
83-1022. Mental health board proceedings; when commenced; petition; certificate; subject, notified of rights.
83-1023. Subject admitted by certificate; evaluated; decision; discharged from custody; when.
83-1024. Person believes another to be a mentally ill dangerous person; notify county attorney; petition; when.
83-1025. Petition; contents; filed; where; transfer of proceedings.
83-1026. Petition; verified; county attorney statement; emergency custody under certificate; effect; how entitled; dismissal; when.
83-1027. Petition; immediate custody not required, summons; final or preliminary hearing; sheriff; duties; failure to appear; warrant for custody.
83-1028. Petition; immediate custody required; warrant; sheriff to take subject into custody until hearing; duties.
83-1029. Subject admitted by warrant; evaluated; decision.
83-1030. Subject in custody by warrant; preliminary hearing; final hearing; when held.
83-1031. Final hearing; not held within five days; preliminary hearing; purpose; mental health board; duties.
83-1032. Mental health board; preliminary hearing; subject not a mentally ill dangerous person; dismiss petition and discharge

subject; subject is a mentally ill dangerous person; voluntary treatment alternative; when; procedure.
83-1033. Mental health board; preliminary hearing; subject is a mentally ill dangerous person; order; final hearing.
83-1034. Board; order subject retained in custody or released pending final hearing; when held.
83-1035. Final hearing; purpose; mental health board; duties.
83-1036. Final hearing; subject denies allegations of petition; proceedings; suspension of proceedings; voluntary treatment alternatives; procedure.
83-1037. Mental health board; final hearing; determination that subject is a mentally ill dangerous person; order of final disposition.
83-1038. Mental health board; final disposition; considerations.
83-1039. Subject in need of board ordered treatment; custody pending entry of an order of final disposition.
83-1040. Subject in need of board ordered treatment; determine best treatment disposition; predisposition investigation; report and recommendations; predisposition assistance; psychiatric and psychological evaluation.
83-1041. Subject in need of board ordered treatment; board; issue warrant; contents; commitment; when completed.

83-1042. Involuntary treatment requiring confinement; subject taken to facility; procedure.
83-1043. Final order of mental health board; appeal; final order of district court; appeal.
83-1044. Final order of disposition; designate individual to prepare and supervise an individualized treatment plan; contents; copy; filed.
83-1045. Person responsible for subject's individualized treatment plan; periodic progress reports; filed and served.
83-1046. Mental health board; order discharge or change treatment disposition; when.
83-1047. Rights subjects are entitled to during proceedings against them; sections enumerated.
83-1048. Subject's rights; written notice of the time and place of hearings; reasons alleged for board ordered treatment; procedure.
83-1049. Subject's rights; representation by counsel; appointment of counsel if indigent.
83-1050. Appointment of counsel; procedure.
83-1051. Appointed counsel; fees; reimbursement of costs incurred; procedure.
83-1052. Subject's rights; independent evaluation and assistance in proceedings; fee and expenses.
83-1053. Counsel for subject; rights, enumerated; discovery; appeal from denial of discovery; when.
83-1054. Continuances; liberally granted.
83-1055. Mental health board hearings; closed to public; exception; where conducted.

83-1056. Subject's rights; preliminary and final hearings; appeal in person and testify in own behalf; present witnesses and evidence.

83-1057. Subject's rights; compulsory process to obtain testimony of witnesses.

83-1058. Subject's rights; preliminary and final hearings; confront and cross-examine adverse witnesses and evidence.

83-1059. Preliminary, final, and judicial hearings; rules of evidence applicable.

83-1060. Subject's rights; written statements; contents.

83-1061. Proceedings shall be of record; reporter; expenses and fees.

83-1062. Qualified mental health professional; provide medical treatment to subject; when.

83-1063. Subject acquitted of liability in criminal proceeding; use of evidence.

83-1064. Subject; waive rights; manner.

83-1065. Rights of subjects in custody or receiving treatment.

83-1066. Subjects in custody or receiving treatment; rights; enumerated.

83-1067. Subjects in custody or receiving treatment; waive or consent to denial of rights; manner.

83-1068. Subject's records; confidential; exceptions.

83-1069. Violations; penalty.

83-1070. State Board of Mental Health; created; members; qualifications; chairperson.

83-1071. State Board of Mental Health; compensation; expenses.

83-1072. State Board of Mental Health; provide rehearings for persons involuntarily committed; where held; when.

83-1073. Rehearings; three members present.

83-1074. State Board of Mental Health; rehearings: what considered; procedure.

83-1075. State Board of Mental Health; rehearing; Attorney General; powers, duties, and responsibilities.

83-1076. State Board of Mental Health; determine if subject is indigent; provide for appointment of counsel.

83-1077. State Board of Mental Health; cease to exist; when.

83-1078. Act, how cited.

QUESTIONS PRESENTED FOR REVIEW

A. Whether a prisoner sentenced to the Department of Correctional Services, who has never been judicially determined to be mentally ill, may be involuntarily transferred to a state mental hospital under the Department of Public Institutions without the benefits of procedural due process, when such transfer will submit him to chemotherapy, behavior modification programs and the stigmatization programs and the stigmatization of being labelled mentally ill.

B. Assuming process is due prisoners who are to be involuntarily transferred to state mental hospitals, does the unique nature of this transfer afford the accused the availability of legal counsel.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343(3) and (4), 28 U.S.C. §2201 and 28 U.S.C. §2202. The action was originally brought by plaintiff Charles Miller and was certified as a class action on August 18, 1976. Following a hearing, the action was decertified, and Larry D. Jones, William George Foote, and William McKinley Hines were added as individual plaintiff-intervenors on their motions. (Memorandum of Decision, Jurisdictional Statement, App. 15). Plaintiffs claimed that their involuntary transfers from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center pursuant to *Neb. Rev. Stat.* §83-180 were unconstitutional, in that the statutory scheme deprived them of due process of law and the equal protection of the laws (App. 12, 13, 23, 24). Pursuant to a memorandum of decision and order entered on September 12, 1977, and a judgment entered on October 14, 1977, a three-judge court of the United States District Court for the District of Nebraska declared *Neb. Rev. Stat.* §83-180(1) to be unconstitutional in violation of the Due Process Clause of the fourteenth amendment to the United States Constitution. The court found lawsuit moot as to all plaintiffs and intervenors other than Larry D. Jones.

Plaintiff-intervenor Larry D. Jones (appellee) was convicted of the crime of robbery and sentenced to the Nebraska Penal and Correctional Complex for a term of three to nine years from the District Court of Douglas County, Nebraska (App. 18, R. 73). He began serving his sentence on May 31, 1974 (App. 18). He first began to serve his sentence by assignment to the reception-diagnostic center at the Nebraska Penal and Correctional

Complex for thirty days (R. 73). He was then transferred to the reformatory where he remained from June of 1974 until January of 1975 (R. 73, 74). He was then transferred to the Penal Complex penitentiary hospital and, after an incident, was transferred two days later to the area of solitary confinement known as the adjustment center (R. 74). While in the adjustment center, in an attempt to move himself to the penitentiary hospital, he set his mattress on fire (R. 74, 75). While waiting for the guard to arrive he was severely burned, and he was transferred by ambulance from the Nebraska Penal Complex to St. Elizabeth's Hospital in the city of Lincoln, where he remained for about four to five months (R. 75, 112, 113). From St. Elizabeth's Hospital he was involuntarily transferred pursuant to *Neb. Rev. Stat.* §83-180(1) to the security unit of the Lincoln Regional Center (R. 76-78).

The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions (App. 16, R. 58). Its purpose is for the treatment of the emotionally disturbed, mentally ill, mentally diseased, and those suffering from mental defects (App. 16). All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal and Correctional Complex and the Nebraska State Reformatory to the Lincoln Regional Center are confined at the security building, which is the institution's maximum security facility (App. 16, R. 37). The Nebraska Penal and Correctional Complex is under the Department of Correctional Services. Both the Department of Public Institutions and the Department of Correctional Services are executive departments of the State of Nebraska, and their directors are both appointed by the Governor of the State of Nebraska (R. 58, *Neb. Rev. Stats.* §§81-101-102 [Reissue 1976]).

The statute found unconstitutional by the lower court, *Neb. Rev. Stat.* §83-101(1), provides in part that if a physician or psychologist designated by the Director of Corrections finds that a person suffering from a mental disease or defect cannot be given proper treatment in the facility in which he is so confined, the person may be segregated from other persons in that facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, then the director may arrange for his transfer for examination, study, and treatment to any other medical-correctional facility or to another institution in the Department of Public Institutions where proper treatment is available.

Neb. Rev. Stat. §83-173 (Reissue 1976) allows the Director of Correctional Services to designate the place of confinement of persons committed to that department.

Neb. Rev. Stat. §83-176 (Reissue 1976) provides that whenever a person is sentenced or committed to a specific facility within the Department of Correctional Services he shall be deemed to be sentenced to that department. The director may designate as a place of confinement any available and suitable institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another.

The lower court enjoined the defendants from transferring plaintiff-intervenor Larry D. Jones from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center until his complete discharge from the custody of the State of Nebraska on the criminal sentence he is now serving, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
D. An independent decisionmaker;
E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
F. Availabiity of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
G. Effective and timely notice of all the foregoing rights.

(Jurisdictional Statement, App. 12-13)

SUMMARY OF THE ARGUMENT

I.

An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable

from an involuntary transfer from one prison to another. The state has rested much of its case on the holdings of *Meachum v. Fano*, 427 U.S. 215 and *Montanye v. Haymes*, 427 U.S. 236. These cases are clearly distinguishable from the case at hand. *Meachum, supra*, involved the transfer of inmates from a medium security institution to a maximum security institution for disciplinary reasons. *Montanye, supra*, involved the transfer of an inmate from one maximum security unit to another. Here the plaintiff was transferred from a penal and correctional complex to a state mental hospital.

The plaintiff maintains that he possesses a protected liberty interest in not being arbitrarily transferred to a state mental hospital, and the uniqueness of the transfer alone makes it difficult to categorize within the limited framework of the *Meachum* and *Montanye* decisions. Assuming that the cases can be read so broadly as to encompass the factual situation at hand, it would clearly fall within the recognized exception in *Meachum*. The court below found there was an objective expectation rooted in state law and official prison practice, that such transfers would not occur except when an inmate becomes mentally ill and could not be treated at the prison. (Memorandum of Decision, Jurisdictional Statement, App. 7, 8). The state has argued that *Neb. Rev. Stat.* §83-180 (Reissue 1976) does not give the prisoner such an expectation rooted in state law. Yet the mere existence of a procedure outlined in the statute, found unconstitutional, does not guarantee that the procedure is not subject to constitutional challenge.

The transfer from a prison to a state mental hospital cannot be categorized as merely an administrative transfer. *Baxstrom v. Herold*, 383 U.S. 107; *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1971); *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974). The stigma that attaches to those confined and labelled mentally ill and the use of mandatory behavior modification and chemotherapy are the most important factors why such transfers are not simply administrative.

Transfer to a mental hospital certainly involves the risk of a loss of liberty which is even more fundamental and greater than the loss of parole, good-time, probation, or transfer to solitary confinement.

The court below upon finding that due process attached to the plaintiff's liberty interest, properly used the analytical framework set out by this Court in *Matthews v. Eldridge*, 424 U.S. 19 (1976). The plaintiff's private interest was found to be the avoidance of a more controlled environment and being labelled mentally ill, which carries a distinctive stigma. The risk of an erroneous deprivation was relatively high because of the limited statutory safeguards.

The state failed to make a showing of how any additional hearing procedure would create an additional administrative or fiscal burden.

II.

The plaintiff clearly has a protected private liberty interest in the avoidance of being stigmatized mentally ill and subjected to chemotherapy and behavior modification programs. Even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid conviction, an individual does possess a residuum of constitutionally protected liberty. This Court noted in *O'Connor v.*

Donaldson, 422 U.S. 579, that involuntary confinement to a mental hospital is a deprivation of liberty to which due process attaches. This Court in *Baxstrom, supra,* and other courts in *Schuster* and *Chesney, supra,* would not have invalidated involuntary criminal commitment schemes using an equal protection analysis, had not a protected liberty existed. Courts have increasingly recognized that a stigma attaches to those confined in mental institutions, which follows a person throughout his life, regardless of the duration of the confinement. The court below properly recognized that a transfer to the Lincoln Regional Center resulted in greater limitation of freedom, had stigmatizing consequences, and, coupled with mandatory behavior modification, resulted in a major change of confinement tantamount to a grievous loss. (Memorandum of Decision, Jurisdictional Statement, App. 8).

The decision of the court below requiring minimal due process for transfer to a state mental hospital does not take medical decisions away from health professionals as is argued by the state. The hearings contemplated will undoubtedly involve the testimony of health professionals, whose credibility will be weighed by the trier of fact. Involuntary treatment for mental illness is also distinguishable from routine medical treatment because of the stigmatizing consequences and the uncertainties which accompany psychiatric diagnosis and therapy.

The National Advisory Commission on Criminal Justice Standards and Goals advocates detailed procedural safeguards for transfers between correctional and mental institutions. *Corrections,* Standards 2.13, 16.12.

III.

In addition to minimal due process requirements, an inmate involuntarily transferred to a state mental institution must be afforded the right to counsel because of the uniqueness of the disabilities which accompany the mentally ill. Unless an individual is able to comprehend, examine, evaluate, and challenge the process that he is afforded, it is of little or no consequence. As the lower court noted, a prisoner's rights unless known are rather illusionary. (Memorandum of Decision, Jurisdictional Statement, App. 12).

ARGUMENT

I.

AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER.

Larry D. Jones was involuntarily transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, a state mental hospital. He had never been adjudged insane or incompetent by any court nor had he ever been brought before a mental health commitment board of the State of Nebraska or any state (R. 76). Once transferred he was forced to take Thorazine, his prescribed medication (R. 79). When he refused, he was injected with

the medication, taken to a quiet room, and placed in waist restraints (R. 81). He was also placed on a behavior modification program, which was also involuntary (R. 89, 38-41). In all respects this was not a mere transfer from one part of a correctional system to another. The findings of the court below were in accord, ". . . Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs, and to take whatever medication may be prescribed for them. . . ." (Memorandum of Decision, Jurisdictional Statement, App. 6).

Appellants have rested much of their case on the decisions of *Meachum v. Fano,* 427 U.S. 215, and *Montanye v. Haymes,* 427 U.S. 236. The strict and limited holdings of the courts are found in *Montanye, supra* at 242:

> We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one *prison to another* within the state, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. [Emphasis added]

Both cases cited by the appellant in support of their claim that no due process violation existed in the instant case, involved factual situations that are distinguishable from the case at hand. *Meachum* involved the transfer of inmates from a medium security institution to a maximum security institution as disciplinary action for setting fires. *Montanye*, the companion case, involved the transfer of an inmate from one maximum security correctional facility to another maximum security correctional facility in a

different location, allegedly because the inmate had circulated a petition protesting his removal from a prison job. In the case now before this Court, we are faced with an entirely different transfer scheme, the transfer from a penal and correctional complex to a state mental hospital. The state transfer statute challenged in *Meachum* did not deal with transfers from a state prison to a state mental hospital but provided only that:

> §97 Transfers *From* and *To* Correctional Institutions.
>
> Approval.
>
> The Commissioner may transfer any sentenced prisoner from one *correctional institution* of the commonwealth to *another*, an with the approval of the sheriff of the county from any such institution except a prisoner serving a Life Sentence to any *jail* or *house of correction* or a sentenced prisoner from any *jail* or *house of correction* to any *such institution* except the state prison, or from any *jail* or *house of correction*. . . .
>
> *Mass. Gen. L. Annot.* §97 (1974) cited in *Meachum, supra.* p. 227 Foot. 7 [Emphasis added]

Clearly, the statute dealt only with transfers between correctional facilities. These cases might be controlling if an involuntary inmate transfer from the Nebraska State Reformatory to the Nebraska Penal and Correctional Complex were being challenged. The court below specifically found that, ". . . Inmates are not assigned to the Lincoln Regional Center for any administrative or correctional purpose. . . ." (Memorandum Opinion, Jurisdictional Statement, App. 7).

It is our contention that the liberty interest a prisoner maintains from arbitrary transfer to a state mental hospital is so unique that it is difficult to categorize within the

limited framework of the *Meachum* and *Montanye* decisions. To find the statute in question unconstitutional, we therefore do not feel it necessary to come within the recognized exceptions noted in these cases. But assuming arguendo that these opinions can be read so broadly, so as to encompass the factual situation in the case at hand, we would agree with the court below that a prisoner has a justifiable expectation rooted in state law and Penal Complex practice, that he will not be transferred to a state mental hospital unless he is mentally ill and cannot be adequately treated at the Penal Complex.

The court below found that the transfers to the Lincoln Regional Center were conditioned upon a finding that a prisoner suffered from a mental disease or defect and could not be adequately treated within the Penal Complex (R. 8, 9, 10) (Memorandum Opinion, Jurisdictional Statement App. 7). The court also went on to state that ". . . the statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that the transfers to the Lincoln Regional Center are so conditioned in practice." (Memorandum of Opinion, Jurisdictional Statement App. 7).

Larry Jones clearly had an expectation firmly fixed in state law coupled with Penal Complex practice that he would not be transferred to a state mental hospital unless he became mentally ill, and he could not be treated at the Penal Complex. The fact that the statute helps give the prisoner the expectation rooted in state law that he will not be transferred to a mental hospital unless mentally ill and could not be treated at the prison, does not exclude the possibility that the statute's procedure for transferring the prisoner is unconstitutional, for its failure to meet minimal due process requirements.

There exists additional precedent for the proposition that

right to a hearing compatible with due process standards is strongly rooted in Nebraska state law, although in the civil context. *Doremus v. Farrell*, 407 F. Supp. 509 (U.S.D.C. Neb. 1975); *The Nebraska Mental Health Commitment Act Neb. Rev. Stats.* §§83-1001-1078.

The state argues that the mere existence of *Neb. Rev. Stat.* §83-180(1) and its questionable transfer procedures gives a prisoner an expectation that he will be transferred according to its stated procedures. The mere reading of the procedures outlined in the statutes does not leave open the possibility of constitutional challenge to the procedural aspects of the statute, once it has raised expectation in the prisoner that he will not be transferred unless mentally ill. The mere existence of *Neb. Rev. Stat.* §83-180(1) would seem to indicate that the transfer to a state mental hospital, because of the tremendous liberty interest involved, requires closer scrutiny. Otherwise why would not the state effectuate such transfers pursuant to *Neb. Rev. Stat.* §83-176 (Reissue 1976)?

The limited holding reached in *Meachum* was based in part on the decision of this Court not to place the Due Process Clause ". . . astride the day to day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum, supra,* p. 228, 229. It is our contention that an involuntary transfer to a state mental hospital is not merely an administrative matter nor a discretionary decision, regardless of the fact that a physician or psychologist may make the decision. This Court in the case of *Baxstrom v. Herold*, 383 U.S. 107 (1966) stated that such transfers could not be categorized simply as administrative transfers:

> . . . This statutory classification cannot be justified by the contention that Dannemora [state hospital] is

> substantially similar to other mental hospitals in the state, and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. . . . *Baxstrom, supra,* p. 113.

Other courts have recognized that the differences in the two types of incarceration (prison-mental hospital) ". . . are simply too great to treat the transfer to a mental hospital as a routine administrative procedure. The consequences of a mistake are sufficiently great to warrant giving prisoners the same protection as non-prisoners receive. . ." *Matthews v. Hardy,* 420 F.2d 607, 611 (1969).

Perhaps the most significant reason why transfers from a penitentiary to a mental hospital involve a great deal more than a normal prison administrative transfer is that an individual mistakenly placed in a mental hospital may suffer severe emotional or psychic harm. The common use of chemotherapy in mental hospitals can contribute to the disturbing possibility that one mistakenly confined in a mental institution may actually become mentally ill. Mental patients are forced to endure added frustration, hardships and restrictions to which typical prisoners are not exposed (R. 80-99). See also *U.S. ex rel. Schuster v. Herold,* 410 F.2d 1071 (2nd Cir. 1969).

In *Chesney v. Adams,* 377 F. Supp. 887 (1974) a prisoner challenged the constitutionality of the procedure used to transfer him from the Connecticut Correctional Institution to the Security Treatment Center, contending that the state in question allowed for his transfer without a hearing, which was afforded to non-prisoners. The court in finding the state statute unconstitutional noted that the disparity in procedural safeguards afforded prisoners relevant to the smooth functioning of the prison or discipline of prisoners does not allow for justification for labeling such a transfer an administrative matter. *Chesney, supra,* p. 894.

The court below took note of the greater limitations of freedom of action at the Lincoln Regional Center, the fact that a transfer there has stigmatizing consequences and that the use of mandatory behavior modification technique all combine to make a transfer there tantamount to a major change in the condition of confinement amounting to a grievous loss. (Memorandum Opinion, Jurisdictional Statement, App. 8)

The state has argued that the prisoner failed to prove that the statute (§83-180) was not followed and that any right by virtue of the statute was given to the prisoner. The initial complaints of the plaintiff and intervenors clearly indicate that we agree that the statutory procedure for transfer was followed, but challenge its constitutionality on its face and as applied. (App. 7, 12, 13, 19, 23, 24).

This Court has held that due process attaches in a number of cases which have been cited in the brief of the State: *Morrissey v. Brewer,* 408 U.S. 471 (parole); *Gagnon v. Scarpelli,* 411 U.S. 778 (probation); *Wolff v. McDonnell,* 418 U.S. 539 (good time). These cases deal generally with grants of liberty which were affirmatively conferred by state law. Common sense would seem to dictate that the freedom from being involuntarily placed in a mental institution is a much more *fundamental* liberty than loss of good time, probation or parole. Even though the loss of one's parole may cause the interruption of one's life, one is free to be paroled again. Even though one may lose his preferred status of probation, he may once again regain it, as in the case of good time. But once someone is transferred involuntarily to a state mental hospital, the stigma does not leave. Nor do the affects, or side affects, of chemotherapy necessarily leave once the individual is free again. And one mistakenly

labelled mentally ill, who remains so confined for a long duration, may actually become mentally ill. And certainly transfer to a mental hospital involves more of a loss of liberty than transfer to maximum security and solitary confinement. See *Wolff, supra,* at 571-72 n. 19; *Enomoto v. Wright* (Aff. w/o opinion February 21, 1978, ____ U.S. ____, U.S.L.W. 3513).

The court below, having realized that a substantial "liberty interest" was involved, chose to use the analytical framework set out by this Court in the case of *Matthews v. Eldridge,* 424 U.S. 319, 334, 335 (1976) which suggested:

> [O]ur prior decisions indicate that identification of the specific interest dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirements would entail. See, *e.g., Goldberg v. Kelly, supra* at 263-271. See also (Memorandum of Decision, Jurisdictional Statement, App. 8).

The first factor, the private interest of not being transferred to a state mental hospital, is different from the interests in *Meachum, Montanye,* or *Wolff.* Here the prisoner has greater private interest because of the stigmatizing affects of being placed with the mentally ill and being labelled mentally ill. Also, the interest is greater because the prisoner, after the transfer, may be subject to the behavior modification programs which include the use of chemotherapy.

Secondly, the risk of an erroneous deprivation of the

private interest was found by the lower court to be high, since the statute allows transfer of the prisoner based on the opinion of only one physician or psychologist. This is the only safeguard, and the transferee often is unable to challenge or understand the conclusions of the physician. The risk may be even higher when a prisoner is transferred on the opinion of a medical physician who may not even have training in psychology or psychiatry. The record of the proceedings below indicates that an even higher risk may be involved as oftentimes there is a delay in the return of the prisoner to the Penal Complex after he has been treated and cured at the Regional Center (R. 172-173). In the case of intervenor William George Foote the delay was four weeks (R. 173).

In evaluating the state's interest the lower court found:

> Swiftness does not appear to be a major need in view of the availability at the Penal Complex of physical security, some psychiatric and psychological staff and a hospital. Hazards of calling witnesses at a hearing either within or outside the Penal Complex, whether those witnesses are prisoners or non-prisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined. Usually, the witnesses in a mental hearing will be nonprisoners. (Memorandum of Decision, Jurisdictional Statement, App. 10).

Additionally, the state failed to make a showing of how additional procedure prior to involuntary transfer mandated by the court below would create an additional administrative or fiscal burden. The record is totally absent on this point. The state in its brief criticizes the lower court for recognizing the state's interest in placing a prisoner in the institution best

equipped to handle him, but ". . . did nothing to follow through on this." (Appellants' Brief p. 28). Looking at a record totally absent of any data or testimony on this issue, the court had nothing with which to follow through on.

As a practical matter there are probably relatively few individuals who contest their transfers. The Department of Correctional Services in Nebraska could use its hearing officers which it hired to conduct parole revocation hearings after this Court's decision in *Wolff, supra.* It would, therefore, seem that no additional burden is or has been placed on the state because of the mandate of the lower court.

II.

A PRISONER HAS A PROTECTED LIBERTY INTEEST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS.

The fourteenth amendment prohibits any state from depriving a person of life, liberty, or property without due process of law. The state has attempted to define "liberty" as only those rights which the state chooses to grant. If this were the case, the only objective expectation that a prisoner would have in not being arbitrarily transferred to a mental institution would be that which the state arbitrarily chooses to give to him. This is a rather jaundiced approach to the common understanding of the concept of liberty in a non-totalitarian state. We contend that even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid

conviction, an individual does possess a residuum of constitutionally protected liberty. Mr. Justice Stevens in the dissent of *Meachum* in his discussion of *Morrissey v. Brewer,* 408 U.S. 471, aptly characterized this concept:

> . . . For if an inmate's protected liberty interests are no greater than the State chooses to allow, he is really no more than the slave described in the Nineteenth Century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore. *Meachum, supra,* p. 233.

To carry the state's argument to its logical absurdity by virtue of *Neb. Rev. Stats.* §§83-176-180, the Director of Correctional Services may place an inmate anywhere he wishes and for however long he wishes. If the Department of Public Institutions happens to operate a mental hospital using electroshock therapy or homes for the retarded, an inmate has no liberty interest whatsoever in not being transferred there. And the Constitution of the United States affords him no protection, because the statutory scheme has created no justifiable expectation that he will not be so transferred. Rather, a prisoner has a constitutionally protected liberty interest in the avoidance of transfer to a mental hospital regardless of where he was transferred from. This Court has recently noted in the case of *O'Connor v. Donaldson,* 422 U.S. 579 (Burger, concurring opinion):

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. *Specht v. Patterson,* 386 U.S. 605, 608, 87 S. Ct. 1209, 1211, 18 L. Ed. 2d. 326 (1967). *In Re Gault,*

> 387 U.S. 1, 12-13, 87 S. Ct. 1428, 1435-1436, 18 L. Ed. 2d 527 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. . . .

This Court in the case of *Baxstrom v. Herold,* 383 U.S. 107, dealt with a situation in which a prisoner nearing the end of his prison term was committed to a mental hospital, but under a New York statute did not have the option of jury review on the issue of insanity, which all other persons civilly committed possessed. The Court invalidated the procedure, using an equal protection analysis. The case clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the fourteenth amendment, arbitrarily withhold it from a class of people. Although the case was decided on equal protection grounds, the Court would not have so found unless there existed a fundamental constitutionally protected liberty, that the prisoner Baxstrom possessed in not being involuntarily committed to a mental hospital.

Lower courts have followed the *Baxstrom* decision that a non-prisoner has a liberty interest in not being involuntarily transferred to a state mental hospital. In the case of *United States ex rel. Schuster v. Herold,* 410 F.2d 1071 (2nd Cir. 1969) a factual situation existed almost identical to the case at hand, as a prisoner was transferred to a state mental hospital, which was more restrictive than the prison. Also using an equal protection analysis, the court determined that a classification scheme existed, and that there was no rational basis behind the scheme for treating prisoners differently. The court held that before a prisoner may be transferred to the state mental hospital he was entitled to the

same procedures as those afforded to non-prisoners when they are involuntarily transferred to a mental hospital. *Schuster, supra,* p. 1084. The court would not have so held had they not felt that a liberty interest was retained by prisoners and non-prisoners alike. The court focused on the severe restrictions placed on the criminally insane and indicated that such transfers were not merely administrative matters. *Schuster, supra,* p. 1078. Even more important, the court recognized the dangers to such transfers when minimal procedural rights are afforded:

> In considering the problem posed, we are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad, but dangerously so . . . Confined with those who are insane, told repeatedly that he too is insane, and indeed treated as insane, it does not take much for a man to question his own sanity and in the end succumb to some mental aberration. *Schuster, supra,* p. 1078.

The court in *Schuster* as in the case of *Matthews v. Hardy,* 420 F.2d 607 (1969) focused upon the fact that a stigma is attached to the mentally ill which is different from that attached to the criminal class in general. The court in *Chesney v. Adams,* 377 F. Supp. 887, 893 (D. Conn. 1974) in a substantially similar case relying upon *Matthews* and *Schuster* pointed out that a mental hospital commitment can have great effects on ". . . job possibilities and personal associations." Even if a prisoner is released after a short period of time, for what is commonly referred to as "evaluation and treatment," the damage done may be the stigma imprinted, regardless of the duration of the confinement. Additionally, a mental health commitment on one's record may result in:

> . . . State constitutional and statutory restrictions on voting rights; restrictions on one's right to serve on a federal jury; restrictions on one's ability to obtain a driver's license; and limitations on his access to a gun license. Moreover, it is still commonly held that an adjudication of mental incompetency gives rise to a rebuttable presumption of continued incompetency. In many jurisdictions such a presumption may in turn affect the right to dispose of property, to execute contracts and to perform many similar and commonplace functions. Indeed, such an adjudication, while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system. Such evidence will frequently be revived to attack the capacity of a trial witness. Depending upon the diagnosis, it may be admissible for impeachment purposes. Indeed, even in a criminal trial, it may be available to attack the character of a defendant, if he has put his character in issue. Most significantly, records of commitments to a mental hospital will certainly be used in any subsequent proceedings for civil commitment. *In Re Ballay,* 482 F.2d 648, 651, 652 (D.C. Cir. 1973).

The court below properly recognized that a transfer to the Lincoln Regional Center results in greater limitations on freedom of action, has stigmatizing consequences, and that coupled with mandatory behavior modification, results in a major change of confinement tantamount to a grievous loss (Memorandum of Decision, Jurisdictional Statement, App. 8).

The patients at the Lincoln Regional Center are not allowed to keep the following items in their cells:

1. Matches (R. 41)
2. Cigarettes (R. 82)
3. Cigarette lighters (R. 82)

4. Shaving razors (R. 82)
5. Nail clippers (R. 82)
6. Magazines (R. 42) (S-5 only)
7. Shoes (R. 83, 42-43) (S-5 only)
8. Stereos (R. 43)
9. Radios (R. 43)
10. Televisions (R. 43)
11. Food (R. 82)
12. Books (R. 43, 83, 94-95)
13. Pen (R. 83)
14. Pencils (R. 83)
15. Writing paraphernalia (R. 43)
16. Glass articles (R. 43)
17. Gum (R. 41, 42, 82)
18. Belt (R. 83)
19. Musical instruments (R. 137)
20. Painting materials (R. 96)
21. Ash trays (R. 43)

These articles may be kept by prisoners in their cells at the Nebraska Penal and Correctional Complex (R. 12, 13, 14, 83, 132).

Most of the articles may not be carried by the patients on their person at the Lincoln Regional Center Security Building, while the same prohibition does not exist at the Nebraska Penal and Correctional Complex (R. 17, 18, 20, 21, 44, 82, 83).

At the Lincoln Regional Center Security Building the patients suffer the following additional losses of freedom which are not denied the inmates at the Nebraska Penal and Correctional Complex:

A. Must be accompanied by guards or security technicians when they leave the ward.

B. Are allowed only four sets of clothing.
C. Are not allowed to earn money by working on the ward.
D. Are not eligible for work-release programs.
E. Are not eligible for work-training programs, including carpentry, welding, drafting, metal manufacturing, automotive body repair, and other vocational skills.
F. Are forced to take afternoon naps.
G. Are not allowed daily access to the gym, weight-rooms, and the outdoors.
H. Are sometimes punished by means of leg, waist, and bed restraints.
I. Are punished for aggressive behavior by being given drugs to subdue them.
J. May not chew gum.
K. Are subject to time restrictions for smoking.
L. Are forced to do unpaid ward work in addition to mopping, sweeping, and buffing the floors and halls.
M. Are limited in the number of organized sports.
N. Have a definite time at which they must go to bed.
O. Are given virtually no outside entertainment.
P. Are not allowed to keep or play instruments in their rooms, form bands, or listen to those who have formed bands.
Q. Are not allowed to paint in their rooms or to have access to an art club and an art display where they might sell their artwork.
R. Have their silverware individually counted, handed to them, and individually taken away from them at mealtime.
S. Have no access to high school equivalency courses, correspondence courses, or educational-release programs at local universities.

T. Are not allowed access to a law library.
(R. 11-24, 38-52, 80-99, 128-140).

The record clearly indicates that treatment and confinement at the Lincoln Regional Center Security Building is much more restrictive than the confinement at the Nebraska Penal and Correctional Complex. The obvious reason for the differences is that the Lincoln Regional Center is a mental hospital employing a restrictive behavior modification program, and the Nebraska Penal and Correctional Complex is a prison facility which is designed to confine prisoners, not treat mental illness.

The most important difference between the two institutions is the fact that inmates at the Penal Complex are not forced to take medication and chemotherapy, while the same is mandatory at the Lincoln Regional Center Security Building (R. 79, 80, 128, 129). For this reason standing alone, this Court should find that a prisoner has a "liberty interest" for which he must be afforded due process before transfer to a state mental hospital. The common use of chemotherapy on prisoners for even a short period of time may have unknown side effects and may in effect contribute significantly to the possibility that one mistakenly confined may become mentally ill. The lower court was correct in finding that the risk of an erroneous deprivation of the prisoners' private interests was high, considering the minimal safeguards afforded by *Neb. Rev. Stat.* §83-180(1) (Reissue 1976).

The state has argued that the responsibility for the determination of the need for psychiatric care is properly placed with the health care professionals alone. They have sought to characterize the lower court's decision as one which takes away the decision from health care professionals

and gives it to the attorneys and judges. The state has failed to point out that the procedural safeguards set down by the court below contemplate a hearing in which the testimony of health care professionals will be heard. The safeguards allow the prisoner the opportunity to call independent mental health professionals, who may agree or disagree with those called by the state. Although the independent decisionmaker himself may not be a health care professional, his decision will surely be based on the testimony of other health care professionals, whose credibility will be weighed by the trier of fact. This Court in *O'Connor v. Donaldson,* 422 U.S. 563, 579 (1975) (Burger, concurring) noted:

> The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are complete with evidence of the divergence of medical opinion in this vexing area. *E.g., Greenwood v. United States,* 350 U.S. 366, 375 . . . . See also *Drope v. Missouri,* 420 U.S. 162 . . . (1975).

See also, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CAL. L. REV. 693 (1974).

Under the statute held unconstitutional by the court below, the transfer of a prisoner may be made to a mental hospital on the testimony of a physician alone, who has had no psychiatric training.

The appellants have sought to characterize the transfer of a prisoner to a state mental hospital as no different from a transfer to a medical hospital. Obviously, there is a grave difference. The prisoner sent to a hospital has a right to refuse the treatment if for no other reason than religious beliefs. Rarely would a prisoner refuse such medical treatment as many lawsuits are brought in state and federal courts seeking to force state prison officials to provide adequate medical

care. If a prisoner is sent to a hospital for an operation and is returned to the prison population, this carries no stigma whatsoever. On the other hand, transfer to a state mental hospital carries with it a definite stigma. Some prisoners may not like being placed with and forced to associate with those that suffer from mental defects. In an open ward, as was characterized in the case before us, it may be substantially more dangerous than the normal prison environment. There might also be a presumption that a patient is mentally ill if his sentence expires and he is still confined at the Lincoln Regional Center, which might induce a local prosecutor to bring him before a mental health commitment board. The parole board, looking to his history of confinement in the mental hospital, might be less apt to release him to society. None of these factors, particularly the stigmatizing of the inmate, exists when he seeks and receives medical treatment.

The state has cited and quoted from two sets of Standards for correctional institutions, those of the National Advisory Commission on Criminal Justice (1973) and the Commission on Accreditation for Corrections of the American Correctional Association (1977). These Standards are quoted and discussed to support three propositions: (1) That prison inmates should receive treatment for mental and emotional problems; (2) That these inmates should be transferred to the appropriate facilities where such treatment is available; and (3) That the determination of the need for such transfers should be made by health care professionals.

The Appellee does not in any way disagree with these policies or with the Standards quoted by the state. A prison inmate suffering from mental illness should be provided with treatment at an appropriate facility, and the determination as to their illness should be made by qualified mental health

professionals. The Court should note, however, that the state has failed to quote a number of additional Standards which must be read with those that *were* quoted in order to provide the complete scheme contemplated by the Advisory Commission.

Standard 2.13, Procedures for Nondisciplinary Changes in Status of the National Advisory Commission on Criminal Justice, is as follows:

> Each correctional agency should immediately promulgate *written rules and regulations* to prescribe the procedures for determining and changing offender status, including classification, *transfers,* and major changes or decisions on participation in treatment, education, and work programs within the same facility.
>
> 1. The regulations should:
>
> a. Specify criteria for the several classifications to which offenders may be assigned and the privileges and duties of persons in each class.
>
> b. Specify frequency of status reviews or the nature of events that prompt such review.
>
> c. Be made available to offenders who may be affected by them.
>
> d. Provide for notice to the offender when his status is being reviewed.
>
> e. Provide for participation of the offender in decisions affecting his program.
>
> 2. The offender should be permitted to make his views known regarding the classification, transfer, or program decision under consideration. The offender should have an opportunity to oppose or support proposed changes in status or to initiate a review of his status.

> 3. Where reviews involving substantially adverse changes in degree, type, location, or level of custody are conducted, an *administrative hearing should be held,* involving notice to the offender, an opportunity to be heard, and a written report by the correctional authority communicating the final outcome of the review. Where such actions, particularly transfers, must be made on an emergency basis, this procedure should be followed subsequent to the action. *In the case of transfers between correctional and mental institutions, whether or not maintained by the correctional authority, such procedures should include specified procedural safeguards available for new or initial commitments to the general population of such institutions.*
>
> 4. Proceedings for nondisciplinary changes of status should not be used to impose disciplinary sanctions or otherwise punish offenders for violations of rules of conduct or other misbehavior.
>
> (Emphasis added.)

Similarly, Standard 16.12, Commitment Legislation, provides:

> Each state should enact . . . legislation governing the commitment, classification, and transfer of offenders sentenced to confinement. Such legislation should include:
>
> 5. Authorization for the transfer of offenders in need of specialized treatment to institutions that can provide it. This should include offenders suffering from physical defects or diseases, mental problems, narcotic addiction, or alcoholism.

7. *A requirement that the correctional agency develop through rules and regulations (a) criteria for the assignment of an offender to a particular facility and (b) a procedure allowing the offender to participate in and seek administrative review of decisions affecting his assignment or transfer to a particular facility or program.*

(Emphasis added.)

The Commentary following Standard 2.13 discusses the fact that transfers of the type involved in the case at hand may have serious effects upon a prison inmate's degree of liberty, access to correctional services, and the conditions of existence within the correctional system. The drafters cite *Baxstrom v. Herold*, 383 U.S. 107 (1966) and *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969) to point out that the Courts *have* required procedural protections when inmates are transferred from prisons to mental hospitals. They express the view that the procedures outlined in their Standards must be complied with in order to prevent correctional agencies from exercising their discretionary powers in an arbitrary or capricious manner, as was possible pursuant to *Neb. Rev. Stat.* §83-180 (Reissue 1976).

> Standard[s] [2:13] speak[s] to the discretionary power which correctional agencies exercise over offenders and how that power is to be regulated and controlled. No system of individualized treatment can avoid discretionary power over those to be treated, but such power must be controlled in order to avoid arbitrary and capricious action. National Advisory Commission at 22.

A thorough and complete reading of the Advisory Commission's report indicates, therefore, that the experts in the correctional field have recognized the need for due process guarantees to be afforded a penitentiary inmate facing possible mental hospital commitment. The sections herein quoted make it clear that the drafters of the Standards were aware of the necessity of providing the same rights to persons facing mental hospital commitment from a penitentiary as those civilly committed.

Interpretation of these Standards obviously does not suggest that a due process hearing prior to transfer is inappropriate or futile. Mental hospital commitment is by no means analogous to brain surgery. The distinctive stigma attached to mental illness has been recognized by the courts and its existence mandates that process is due.

III.

AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS.

The court below correctly held that availability of legal counsel, furnished by the state if the inmate is financially unable, must be afforded an inmate at a hearing on the issue of the necessity of his transfer to a mental hospital (Memorandum Opinion, Jurisdictional Statement, App. 11, 12, 13).

The court stated:

> The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a non-prisoner in the

same condition. The capability to examine, understand, evaluate, and challenge the process and the evidence is vital and there may be nobody available to do so, unless it be by counsel, furnished by the State if need be, because of indigency. The State's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals recognized in *Wolff v. McDonnell,* 418 U.S. at 567-570, are overshadowed by the disability which accompanies one who is mentally ill. It should be apparent that the prisoner's rights are largely illusionary, unless he knows those rights. (Memorandum Opinion, Jurisdictional Statement, App. 11, 12).

The court's reasoning is quite sound as it recognized the uniqueness of the disabilities which accompany the mentally ill. Additionally, oftentimes an inmate suffering mental illness who is to be involuntarily transferred will have already been placed on medication. If he is afforded all of the minimal requirements of due process set out in *Morrissey v. Brewer,* 408 U.S. 471 (1972), but not the availability of counsel, who will guarantee for him that he attends his hearing non-medicated? What purpose does it serve to grant minimal due process guarantees if the transferee cannot remember the hearing because he was overmedicated? Who will prevent the state from overmedicating each inmate who wishes to contest his transfer to the state mental hospital? An overmedicated or medicated inmate may appear mentally ill to an independent decisionmaker, who may not be able to properly judge the affects unless presented to him by counsel.

How will an unrepresented inmate know that he is able to have an independent psychiatric evaluation unless told to him by counsel? An unrepresented prisoner might rely on the single diagnosis of the treating physician and psychologist, not realizing the uncertainties of psychiatric diagnosis.

In the case of *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wisc. 1972) the court found Wisconsin's civil commitment procedure unconstitutional, and required persons to be committed be given the opportunity for representation by counsel. The court based its holding on the reasoning used in *Heryford v. Parker,* 396 F.2d 393 (10th Cir. 1968) in which the court compared the situation of a mental deficient to the juvenile delinquency procedure involved in *In Re Gault,* 387 U.S. 1, (1967):

> [L]ike *Gault,* and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. *It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency.* It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that a subject of an involuntary commitment proceedings is afforded the opportunity to [have] the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. . . . *Heryford, supra* at 396. (Emphasis added.)

The court below properly found that the additional requirement of legal counsel is especially needed in the unique situation of transfer to a state mental hospital, because of the tremendous liberty interest involved.

Civil committees are afforded the right to counsel pursuant

to *Neb. Rev. Stats.* §§83-1001-1078 in the State of Nebraska. Those who are to be criminally committed are in the same need of counsel to help cope with the problems and complexities of the law.

Equal Protection Considerations

The court below found that *Neb. Rev. Stat.* §83-108(1) (Reissue 1976) was unconstitutional because of due process infirmities, and did not expressly decide whether or not the procedure was constitutionally infirm using an equal protection analysis. We would agree with the court below that under an equal protection analysis the constitutional question of treating prisoners and non-prisoners in a different manner would depend upon a weighing of the factors discussed in the opinion below.

It is our contention, although not expressly reviewable by this Court, that the same result could have been reached by an equal protection analysis. We disagree with the state's attempt to distinguish *Baxstrom v. Herold,* 383 U.S. 107 (1966). *Baxstrom* clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from a class of people. The only factual distinction is that the plaintiff in *Baxstrom,* already having completed his prison sentence, was challenging his mental health commitment at its expiration, while the plaintiff here challenged his commitment at its inception. Lower courts have followed the analysis in *Baxstrom,* using an equal protection analysis in cases involving nearly identical factual situations to the case

at hand. See *U.S. ex el. Schuster v. Herold,* 410 F.2d 1071 (2nd Cir. 1969); *Chesney v. Adams,* 377 F. Supp. 887 (D. Conn. 1974); *Matthews v. Hardy,* 420 F.2d 607 (1969).

Should this Court wish to find the statute in question unconstitutional using an equal protection analysis, we would contend that the present procedures for civil commitments, *Neb. Rev. Stats.* §§83-1001-1078, do not present an insurmountable hurdle for comparison purposes, because of their enactment after the plaintiff's transfer. Their effective date, April 6, 1976, was still prior to the decision rendered by the lower court on September 12, 1977.

CONCLUSION

The appellee respectfully moves the Court to affirm the judgment entered in this cause by the United States District Court for the District of Nebraska.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE and LARRY D. JONES,

Appellees.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Subject Index

Page

Interest of the State of California 1

Summary of argument 7

Argument 12

I

A person committed to a state prison upon his conviction of a crime has no property or liberty interest in confinement in a particular institution 12

II

The determination of which institution, correctional or mental health, in which each inmate should be placed is a matter of policy and involves an exercise of judgment 19

III

If the due process clause of the Fourteenth Amendment applies to transfer proceedings between correctional institutions and mental health institutions, only rudimentary procedures are necessary 24

Conclusion 27

Table of Authorities Cited

Cases

	Pages
Board of Regents v. Roth, 408 U.S. 564 (1972)	13, 14, 15, 16
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	13
Cruz v. Beto, 405 U.S. 319 (1972)	26
Darey v. Sandritter, 355 F.2d 22 (9th Cir. 1965)	22
Gagnon v. Scarpelli, 411 U.S. 778 (1976)	24, 25
Hannah v. Larche, 363 U.S. 420 (1960)	24
Haughey v. Rhay, 300 F.Supp. 490 (D.C.E.D. Wash. 1969)	22
Jones v. North Carolina Prisoners Labor Union, Inc., ... U.S. ....., 97 Sup.Ct. 2532 (1977)	26
Marchesani v. McCune, 531 F.2d 459 (10th Cir. 1976), cert. denied, 429 U.S. 846	15, 19
Matthews v. Eldridge, 424 U.S. 319 (1976)	24
Meachum v. Fano, 427 U.S. 215 (1976)	12, 13, 14, 17, 18, 20, 23, 26
Montanye v. Haymes, 427 U.S. 236 (1976)	13, 17, 18
Moody v. Daggett, 425 U.S. 78 (1976)	14, 16
Morrissey v. Brewer, 411 U.S. 471 (1972)	15, 24, 25
Paul v. Davis, 424 U.S. 693 (1976)	19
Preiser v. Rodriguez, 411 U.S. 475 (1973)	14
Procunier v. Martinez, 416 U.S. 396 (1974)	26
Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.) (en banc), vacated and remanded to consider mootness, 414 U.S. 809 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973)	18
Stiltner v. Rhay, 371 F.2d 420 (9th Cir. 1967), cert. den. 387 U.S. 925, rehrg. den. 389 U.S. 964	22
Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977)	14
Wolff v. McDonnell, 418 U.S. 539 (1974)	15, 16, 19, 20, 24, 25, 26

Codes

California Penal Code:	Pages
Section 2684	2, 3, 4, 17, 22
Section 2685	4
Section 5003	16
Section 5068	16
Section 5080	16

Constitutions

United States Constitution, Tenth Amendment	10, 23
United States Constitution, Fourteenth Amendment	8, 13, 14, 15, 16, 23, 24, 26, 27

Statutes

Civil Rights Act, Title 42, United States Code, Section 1983	7
Nebraska statute, Sections 83-180, Nebraska revised statutes 1943 (reissued 1976)	3

Other Authorities

California Assembly Bill 476, Statutes 1977, Chapter 165, Section 32	3
Inmate Classification Manual of the California Department of Corrections:	
Section 404	4, 5
Sections 1200-1208	4
Section 1201	5
Section 1202	5
Section 1202(A)(1-7), (B)	5

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Appellees.

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE STATE OF CALIFORNIA

The appeal questions the decision of a three-judge court of the United States District Court for the District of Nebraska which declared a statute of the State of Nebraska to be unconstitutional as failing to provide a constitutionally convicted felon, who had been sentenced to the Nebraska Department of Correctional Services, due process of law prior to his transfer from a correctional facility, to which he had been asssigned by said Department, to a mental hos-

pital within the Nebraska Department of Public Institutions. Under Nebraska law, involuntary transfer of an inmate from an institution of the Department of Correctional Services to an institution of the Department of Public Institutions upon a determination by one or more psychiatrists or psychologists that the prisoner suffers from a mental disease or defect and cannot be given proper treatment in the correctional facility, is authorized procedure within the operations of the Nebraska correctional system and was treated as such by the courts below as well as on appeal. Accordingly, the issue presented clearly comprehends the question of whether the due process clause applies to an administrative transfer of a mentally ill state prisoner from a state correctional institution to a state mental hospital when confinement in said hospital is within the purview of the sentence imposed upon him.

Approximately twenty thousand persons are incarcerated in California prisons. In each of the last three calendar years, an average of over 125 California inmates were transferred from a California Department of Corrections prison to a California Department of Health mental health facility pursuant to California Penal Code § 2684.[1] Such transfers occur when a determination is made that the inmate has a mental disorder or deficiency and that rehabilitation might be expedited by treatment at one of the state hospitals under the jurisdiction of the Department of Health.

[1]California Penal Code § 2684. The text of Penal Code § 2684 appended to this brief as Appendix A.

Under the Nebraska statute, sections 83-180, Nebraska revised statutes 1943 (reissued 1976), which the three-judge United States District Court found to be unconstitutional, when a physician or psychologist designated by the Director of Correctional Services finds that an inmate suffers from a mental disease or defect, and the physician or psychologist is of the opinion that the prisoner cannot be given proper treatment in a facility of the Department of Correctional Services, the Director may arrange for his transfer for examination, study and treatment to an institution of the Nebraska Department of Public Institutions where proper treatment is available. Persons who are transferred remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of the inmate's sentence, treatment in such a facility is no longer necessary.

Under California Penal Code section 2684 (see Appendix A), as amended by California Assembly Bill 476, Statutes 1977, Chapter 165, § 32, when, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient or insane person confined in a state prison may be expedited by treatment at any of the state hospitals under the jurisdiction of the Department of Health, then the Director of Corrections, with the approval of the Community Release Board (formerly the Adult Authority) shall certify that fact to the Director of Health who shall evaluate the prisoner to determine if he would in fact benefit from care and treatment

in a state hospital. If the Director of Health then so determines, the superintendent of a designated mental health hospital shall receive the prisoner and keep him until such time, in that superintendent's opinion, such person has been treated to an extent that he will not benefit from further care and treatment in a state hospital. Thereafter, pursuant to California Penal Code section 2685 (Appendix A), once it has been determined that the inmate may no longer benefit from treatment in a mental health facility, the inmate shall be returned to the Department of Corrections, with the time he has spent at the state hospital counting as part of the sentence served.

All of the determinations by the Director of Corrections concerning whether an inmate is to be so transferred are made with the benefit of screening procedures undertaken in accordance with the provisions of sections 404, and 1200-1208 of the Inmate Classification Manual of the California Department of Corrections (Appendix B). These procedures are designed to aid and assist the Director of Corrections in the exercise of the discretionary authority granted him by Penal Code section 2684.

Under these California procedures, before an inmate will be considered by the Director for transfer to a hospital of the Department of Health, certain criteria have to be met. A medical finding must be made that the inmate either has a psychiatric condition requiring care and treatment not available in the Department of Corrections, but available in a state hospital, or that he has a deteriorating psychiatric

condition which can be slowed, stabilized or improved by care and treatment at the state hospital. Furthermore, an inmate must be administratively evaluated as controllable within the Department of Health hospital's security system and have a potential for achieving a benefit from his placement therein within approximately six months (Appendix B, § 1201).

The procedure whereby these criteria are reviewed and examined involves an administrative review before an Institutional Classification Committee (Appendix B, §§ 1202, 404), at which time the inmate will have the opportunity to make a personal appearance, whenever feasible, and participate fully in that decision by presenting his own views or submitting documents.

If after this screening review has been made by the Institutional Classification Committee and a recommendation for transfer is made to the Director and approved of by the chief medical officer of the institution involved, then the necessary papers (Appendix B, § 1202(A)(1-7), (B)), copies of which are supplied to the inmate, are routed to the Director, and if the recommendation is approved, to the Community Release Board for its consideration. If the transfer is approved at these levels the documentation is sent to the Director of Health for an independent evaluation as to whether or not the inmate would benefit from the care and treatment proposed in the state hospital facility.

If the Director of Health so determines, then the Director of Corrections transfers the inmate to a

mental health hospital facility where he is retained until he will no longer benefit from further care and treatment in such hospital. However, as in the Nebraska provisions, California transfers from Corrections to Mental Health cannot extend the inmate's total period of custody.

While the California system may involve more features than are demonstrated on the record before this Court with regard to the Nebraska system, the outcome of this case could have an immediate effect upon the California transfer process. A determination by this Court upholding the decision of the three-judge court below that due process applies to these transfers could affect California in several important ways. First, the validity of several hundred such transfers could become clouded. Second, if the decision below is upheld, California would be required to rewrite its statutory provisions and change its practices to meet the rigid procedural requirements set forth in the judgment of the three-judge district court.

Third, the range within which the executive and the legislature are able to fashion correctional and mental health policy and procedures in California, adjusting methods to fit determinations as to the proper exercise of correctional and mental health discretion, could well be restricted by a decision upholding the decision below.

Fourth, each mental health transfer of a California prison inmate to a facility better able to meet that inmate's needs in terms of care and treatment, could

be burdened with continuing litigation initiated under the Civil Rights Act, Title 42, United States Code, section 1983. To uphold the decision below would mean invoking unnecessary adversary procedures which may well destroy, and which will, at a minimum, interfere with, the process of medical and psychiatric treatment which this transfer system is designed to provide.

SUMMARY OF ARGUMENT

The putative weight of a prisoner's private interest in avoiding being stigmatized and labeled mentally ill as a result of being placed in a mental health facility should not be considered in determining whether due process applies to a decision by correctional officials to transfer that prisoner from a correctional facility to a mental health facility when the latter institution is one within the terms of the sentence imposed upon the prisoner. Only the nature of the private interest may be considered.

Since this Court has already determined that a transfer between institutions within a state system which is contemplated by the criminal sentence imposed upon an inmate does not give rise to procedural due process rights—that was accomplished in the criminal conviction—then the nature of the prisoner's interest in being retained in a correctional institution rather than being transferred to a mental health institution must be determined from state law.

The due process clause is not implicated by an administrative transfer which does not jeopardize a per-

son's liberty or property. Specifically, a state prisoner who would impose minimum standards of due process upon this form of discretionary transfer from correctional to mental health facilities must establish that state law has conferred upon him a legal entitlement to be retained within a correctional institution, and that this right or privilege is in jeopardy as a result of the discretionary transfer of that individual from said facility.

Where state law has not conferred entitlement to such a right or privilege on an inmate in advance of the transfer proceedings, then at the time of such transfer the prisoner's interest is at best merely a hope or unilateral expectation that he might remain in a particular institution, an interest which does not rise to a constitutionally cognizable liberty interest which would mandate the attachment of due process safeguards. Likewise, neither does such a transfer, made in the exercise of discretion by authorized state officials, to an institution which is within the contemplation of the sentence imposed upon the prisoner, entail loss of a property interest.

The court below, in disregard of the decisions of this Court that due process protection extends only to liberty and property interests within the Fourteenth Amendment, equated the prisoner's interest in such a discretionary transfer between a correctional and a mental health facility with a parolee's interest at a parole revocation hearing.

The reasoning below was based upon an analysis of a Nebraska statute which analysis concluded that such

transfers were neither for administrative nor correctional purposes, but rather were conditioned upon a medical determination of mental disease or defect and the subsequent determination that the mental disease or defect could not be adequately treated within the correctional institution. The Court found that an objective expectation existed, allegedly fixed in state law and correctional practices, that such a transfer would not occur except when the existence of the defect and the inability to treat same at a correctional institution were, in that order, found to exist. Such an interpretation of the decisions of this Court, coupled with the court below emphasizing the "weight" of the loss involved in a transfer of this sort, was clearly erroneous.

The court below heavily relied upon what was clearly an *administrative* determination by Nebraska officials that the mental disease or defect, a medically and independently determined condition or status, with an existence apart from any correctional or judicial determination by state authorities, was one that "cannot be adequately treated at the penal complex". This particular form of decision is clearly of the discretionary/administrative type which this Court has previously found not to infringe any "liberty interest" of a duly convicted prison inmate.

Moreover, the very nature of the transfer proceedings negates the requirements of due process. A correctional department, a mental health department, and a prisoner all have identical interests in that all parties are striving to treat the prisoner in such a fash-

ion as will allow him to be reintroduced into society as soon as possible. The initiation of this sort of transfer proceeding is clearly not adversarial in nature, obviously being medically based. Once that catalytic information is introduced, what follows is an administrative transfer of the type which this Court has found not to require the application of due process protections.

The questions of whether, how, or under what standards and criteria the placement of a state prisoner is to be made during the term of his lawful imprisonment, particularly when such placement is made to treat a mental illness or condition, must be considered to be questions that clearly implicate executive and legislative prerogatives reserved to the states by the Tenth Amendment. The provision for and implementation of treatment-oriented, medically-necessitated, transfers involves considerations of state policy and societal interests. These include protection of society, punishment of the inmate, and the provision for the health and welfare of an inmate who has been properly placed within the care and custody of state correctional officials. All of these concerns are interests paramount to the unilateral expectations of an inmate. To construe state law to impute an intent, not otherwise clearly expressed in positive state law, to confer upon an inmate the right or privilege to placement in a particular institution throughout the entire course of his legally imposed confinement would clearly distort state law so as to favor an inmate's unilateral expectation at the expense

of state policy, societal interests, and, in this situation, possibly the inmate's own personal mental well-being as well.

Finally, even if this Court were inclined to conclude that due process should apply to such transfer proceedings, then the Court should find that only rudimentary process is necessary. Under California practice a prisoner receives notice of his Institution Classification Committee appearance for the purpose of determining whether or not his mental condition fits the criteria for transfer to a state hospital of the Department of Health, an opportunity to make a personal appearance before the committee, when feasible, to participate fully and to present his personal point of view or submit documents bearing on the proposed committee action, notice of the action taken by the committee, and a written statement of reasons for the committee's decision. If the court were to augment such procedures with the additional procedural rights required below, particularly the right of confrontation and cross-examination of the medical professionals involved in making the initial diagnosis and a requirement to provide legal counsel for the inmate at a determination which is clearly medical and administrative in nature and not an adversary proceeding, then it would clearly undermine the duly authorized and necessary powers of correctional officials, interfere with medical and psychiatric determinations and treatment and generally encumber the decision making process involved in such transfers.

A determination by this Court that due process applies would not reduce extensive federal litigation with varying results unless all the minimum requirements of due process are also specified. If due process is to apply at the time of transfer proceedings, it should be restricted to some rudimentary form far short of that necessary in a criminal trial (e.g., counsel, or confrontation and cross-examination of witnesses) or other adversary proceeding, and less also than the process due at parole revocation proceedings where the private interest at stake is far greater, and the administrative burdens are less than would accompany this form of in-prison proceeding. The procedures required in the decision below are far too complex and burdensome for the nature of the proceeding at issue; if required at all, the California procedures should be deemed to be acceptable.

ARGUMENT

I

A PERSON COMMITTED TO A STATE PRISON UPON HIS CONVICTION OF A CRIME HAS NO PROPERTY OR LIBERTY INTEREST IN CONFINEMENT IN A PARTICULAR INSTITUTION.

The decision below that process was due prison inmates when transferred from a correctional institution to a mental health institution, confinement in which was within the statutorily prescribed framework of custodial institutionalization authorized upon conviction, is completely at odds with the principles enunciated by this Court in the cases of *Meachum v.*

Fano, 427 U.S. 215 (1976) and *Montanye v. Haymes,* 427 U.S. 236 (1976). The three-judge court has clearly misinterpreted those cases by applying due process to an administratively determined, medically mandated, transfer decision never envisioned by this Court as requiring due process. The decision specifically equates an inmate's interest in remaining in a correctional institution with a parolee's interest in his conditional freedom on the streets. Upon examination and consideration of the question presented herein, the Court should find that the interest of a prisoner in such a transfer to another institution is insufficient to warrant the attachment of due process safeguards.

The Constitution of the United States does not require that every governmental impairment of some interest be conditioned on notice and an opportunity to be heard. *See Cafeteria Workers v. McElroy,* 367 U.S. 886, 894 (1961). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. (Footnote omitted.) But the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

In determining whether due process applies at all to an administrative transfer decision, the Court should confine itself to an appraisal of the nature of the inmate's interest, and should not consider the

weight of the interest. *Board of Regents v. Roth, supra,* 408 U.S. 564, 571 (1972).

The decision below focused upon the apparent, putative weight of the inmate's interest, concerning itself with "stigmatizing consequences" and subsequent conditions of confinement, to the near exclusion of the nature of his interest, in finding that due process applies to an administrative transfer between institutions of corrections and mental health (see Appendix A to the "Jurisdictional Statement" of the appellants). The determination that due process is applicable to a particular administrative decision is neither dependent upon, nor required by a finding of grievous loss. *Meachum v. Fano, supra,* 427 U.S. 215, 224-225 (1976); *Moody v. Daggett,* 425 U.S. 78, 88 fn. 9 (1976); *Walker v. Hughes,* 558 F.2d 1247, 1250-1251 (6th Cir. 1977).

The concept of liberty under the Fourteenth Amendment has been broadly construed so as to encompass not only freedom from physical restraint, but also the freedom to pursue and enjoy those privileges long accorded to free men. *Board of Regents v. Roth, supra,* 408 U.S. 564, 572 (1972). As a consequence of having been convicted of a crime and being committed to state prison, an inmate is necessarily subject to physical restraint, and his activities are delineated by his custodians. *See Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). In short, by virtue of his conviction, an inmate has forfeited freedom to be free of restraint, to do as he pleases, and to be housed where he would choose. By virtue of

his status, an inmate does not have a liberty interest in being placed in any particular institution, either within the state prison system or within a state-run mental health facility, placement within which is contemplated by state law. It is futher submitted that contrary to the reasoning of the three-judge district court, this Court has held that confinement in one institution as opposed to another cannot be equated with the conditional grant of "many of the core values of unqualified liberty . . ." *Morrissey v. Brewer,* 411 U.S. 471, 482 (1972); *cf. Marchesani v. McCune,* 531 F.2d 459 (10th Cir. 1976), *cert. denied,* 429 U.S. 846.

In addition to the "liberty" language of the Fourteenth Amendment and the analysis thereof discussed above, this Court has indicated that a due process analysis of a liberty interest parallels the accepted due process analysis of a property interest. *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974). As was held by this Court,

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and the dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board*

of Regents v. Roth, supra, 408 U.S. 564, 577 (1972); *see Wolff v. McDonnell, supra,* 418 U.S. 539, 557 (1974).

The same considerations and attitudes apply as well to the liberty interest protected by the due process clause. The essential element of these interests which makes them cognizable under the 14th Amendment is a ". . . claim of entitlement," the phrase subsequently used by the Court in *Moody v. Daggett, supra,* 429 U.S. at 88 fn. 9. As state prisoners have no independent federal constitutional or statutory right to placement or retention in a particular facility once imprisoned as the result of a conviction duly arrived at with due process protection fully accorded, the court must look to state law to determine the nature of an inmate's right, if any, at the time of his discretionary transfer from a correctional institution to an institution of the mental health department of a state. Accordingly, an inmate can have no property interest to be retained in a particular institution unless state law grants him an entitlement to be placed and retained in that particular institution.

A statutory scheme, such as California's, which is premised upon the maintenance of a variety of institutions (*see* California Penal Code section 5003), which grants correctional officials the authority to determine the institution in which a person is to be confined (*see* California Penal Code section 5068), grants these officials the authority to transfer persons from one institution to another (*see* California Penal Code section 5080), and specifically grants the Director of Corrections the authority to transfer, in his

discretion and with the concurrence of other state officials, an inmate confined in a state prison to a mental facility under the jurisdiction of the State Department of Health (*see* California Penal Code section 2684), precludes the recognition of a prisoner's property interest in being placed or retained in one particular institution. *Meachum v. Fano, supra,* 427 U.S. 215 (1976); *Montanye v. Haymes, supra,* 427 U.S. 236 (1976).

In the instant case, the "interest" which the three-judge court designated as a constitutionally protected liberty interest was in fact nothing more than the result of a judicial misinterpretation of what is and what is not a purely "administrative" determination. The "objective expectation" (*see* Appendix A, page 7, "Jurisdictional Statement,") which the three-judge court found to be a "legal entitlement" was the expectation of an inmate concerning his alleged right not to be medically found to be suffering from a mental disease or defect. This is a medical, not judicial, determination. Thereafter, the Court, out of the necessity to justify its final ruling, found that a clearly administrative determination (i.e., that such mental disease or defect could not be treated at a correctional facility in an adequate fashion), was in fact not an administrative decision. This apparent exercise in judicial contortionism was persuasive, at least in the mind of the District Court, for the decision below held that such a transfer does come within the exceptions noted in *Meachum* requiring due process where there was "some right or justifiable expectation rooted in state law that [an inmate] will

not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye v. Haymes, supra,* 427 U.S. 236, 242 (citing to *Meachum v. Fano*) (1976)). Misinterpretation of both the decisional authorities of this Court and the actual nature and effect of the challenged transfer proceedings, clearly goes against the purpose and intent of this Court's prior decisions.

The three-judge court decision concerned itself with an analysis of "grievous loss" as opposed to a proper analysis of the nature of the interest involved. In a decision which discussed just this then emerging differentiation, the Fifth Circuit Court of Appeals held, en banc, that due process protections do not attach to a parole release proceeding, stating:

> "The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protection attaches every time the government takes some action which confers a new status on the individual or denies the request for a different status." *Scarpa v. United States Board of Parole,* 477 F.2d 278, 282 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U.S. 809 (1973), *dismissed as moot,* 501 F.2d 992 (5th Cir. 1973).

As it is clear that the state government does not "confer" nor does an inmate "receive" the "cognizable benefits" of mental health, a status which exists

independent of any action by a legally enjoinable force, then due process does not attach to what is an administrative decision to respond to such a status. *See Marchesani v. McCune, supra,* 531 F.2d 459.

As state law does not extend any legal guarantee of present enjoyment of mental health, any more than it guarantees one's reputation (see *Paul v. Davis,* 424 U.S. 693, 711 (1976)), then due process does not become implicated where an inmate is transferred from one state institution to another state institution for treatment of a mental disorder.

II

THE DETERMINATION OF WHICH INSTITUTION, CORRECTIONAL OR MENTAL HEALTH, IN WHICH EACH INMATE SHOULD BE PLACED IS A MATTER OF POLICY AND INVOLVES AN EXERCISE OF JUDGMENT.

As has been recognized by this Court, "the operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff v. McDonnell, supra,* 418 U.S. 539, 566 (1974). It was with this in mind that this Court required that before it would impose the requirement of due process procedures upon an administrative decision, it would have to be clearly demonstrated that the decision involved jeopardy of an interest, be it liberty or property, to which an inmate is legally entitled. As this Court has noted, "[t]ransfers between institutions . . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the

inmate." *Meachum v. Fano, supra,* 427 U.S. 215, 225 (1976). Furthermore this Court has acknowledged that the need to properly supervise state prisons, a matter of acute interest to the states, necessitates the grant of considerable latitude to prison administrators. *Meachum v. Fano, supra,* 427 U.S. 215, 229 (1976); see also *Wolff v. McDonnell, supra,* 418 U.S. 539, 563 (1974).

In a multi-institution prison system, which contains within it individuals who cannot be readily grouped into a single category either according to custody, personality, character, or mental state, these administrative concerns are brought into focus by the necessity of reaching a determination as to the most appropriate institution for each inmate. This necessitates a judgment as to the personality, character, and mental state of the inmate, an assessment of his particular needs, a determination of the institution which would best meet these needs, and an evaluation of the effect of such a placement on the level of security in an institution.

In a large prison system such as California's, the number of such decisions is a factor which cannot be ignored. Between the years 1975 and 1977 over 375 different inmates were transferred from Department of Corrections facilities into those of the Department of Health for treatment of mental conditions. The transfer of these inmates was necessary both for the welfare of the individual inmates and for the welfare and security of the institutions and personnel thereof from which they were transferred.

As can be seen by a review of the criteria according to which the California Director of Corrections exercises his discretion in making the determination of whether or not to recommend the transfer of an inmate from corrections to a facility of the Department of Health (see Appendix B), a wide variety of factors are evaluated. The choice of the most appropriate institutional placement for such an inmate's psychiatric management, custody and security needs is an involved one. In circumstances involving a particular inmate where a variety of these factors are all relevant, the determination of the appropriate institutional placement becomes more difficult and requires a balancing of the interests in rehabilitation, security, treatment of the individual, and proper administration of the prison system.

Certain needs, such as the need for psychiatric treatment, may be objectively determined by resort to a medical determination on that question. Other needs, such as the appropriate level of custody, must necessarily be based on an exercise of sound judgment and discretion. In some circumstances, the transfer determination can be made through procedures which necessarily require a certain time period for completion (see Appendix B), whereas in other circumstances an immediate decision is required. In some situations, it may be possible to clearly document, in advance, the necessity for such a transfer, whereas in other situations, prison administrators must exercise their discretion to determine whether the probability of serious difficulties or breaches of security is sufficiently high to warrant a transfer on an emergency basis.

A recognition of these factors underlies the present law within the Ninth Circuit insofar as transfers pursuant to California Penal Code section 2684 have been examined by way of federal habeas corpus proceedings. In the case of *Darey v. Sandritter,* 355 F.2d 22 (9th Cir. 1965), the court examined a petition for writ of habeas corpus filed by a California inmate subsequent to his transfer to a state hospital pursuant to California Penal Code section 2684. The inmate contended that a hearing should have been conducted prior to this transfer and alleged that prison authorities had improperly ignored a previous psychiatric report that he was not dangerous to society. In handling these allegations the Ninth Circuit stated, with regard to the inmate appellant's claim, that:

> "It is not appellant's hospitalization which deprives him of his liberty. The deprivation stems from the judgment of conviction and the sentence of confinement. The hospitalization does not result from a separate order or judgment which is independent of the penal judgment and might extend a legally imposed term of restraint. Whether a prisoner, during his lawful term, should or should not receive medical treatment in suitable environs must ordinarily be determined by custodial authorities in the proper exercise of the sound discretion. (Citations omitted)." *Darey v. Sandritter, supra,* 355 F.2d at 23; see also, *Haughey v. Rhay,* 300 F.Supp. 490, 495 (D.C.E.D. Wash. 1969); cf. *Stiltner v. Rhay,* 371 F.2d 420, 421 (9th Cir. 1967), *cert. den.* 387 U.S. 925, *rehrg. den.* 389 U.S. 964.

The establishment and implementation of this transfer procedure is an exercise of the legislative

and executive prerogatives reserved to the states under the Tenth Amendment to the United States Constitution, as it clearly involves "discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano, supra,* 427 U.S. at 225. In fashioning such a process, state governments take into account state policy and societal interests. In the absence of a positive state law conferring upon inmates a claim of entitlement to absolute retention in a correctional rather than a mental health facility during the term of their institutionalization pursuant to a valid criminal conviction, it would not be proper for federal courts to apply the due process clause of the Fourteenth Amendment to override an exercise of discretion involving a legitimate state interest under the Tenth Amendment.

To uphold the determination below, which, despite expressions of legislative intent granting the director of corrections discretionary authority to retain or transfer an inmate under his custody, held that state law nonetheless somehow grants inmates entitlement to retention in a particular institution or type of institution, would be tantamount to direct federal supervision of the exercise of the prerogatives expressly reserved to the states under the Tenth Amendment.

In summary, determining the appropriate institution in which each inmate is to be placed, particularly those inmates suffering from a mental disease or defect as is the case herein, is a complex and difficult task. It is an area wherein the experience, knowledge,

and judgment of the correctional officials who are charged with responsibility for the welfare and security of the inmate is indispensable. As such the development of standards and procedures by which that discretionary authority should be exercised must remain with correctional authorities.

III

IF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES TO TRANSFER PROCEEDINGS BETWEEN CORRECTIONAL INSTITUTIONS AND MENTAL HEALTH INSTITUTIONS, ONLY RUDIMENTARY PROCEDURES ARE NECESSARY.

If this Court determines that due process applies to this particular form of administrative decision, there remains a question of how much process is due. *Morrissey v. Brewer, supra,* at 481; *Wolff v. McDonnell, supra; Gagnon v. Scarpelli,* 411 U.S. 778 (1976). Due process only mandates such procedural safeguards as the particular situation demands. See *Morrissey, supra* at 481. Due process is a flexible concept which varies with different contexts, depending upon several factors, especially "the nature of the alleged right involved, the nature of the proceeding, and the possible burden of that proceeding." *Hannah v. Larche,* 363 U.S. 420, 422 (1960); *Matthews v. Eldridge,* 424 U.S. 319 (1976). If due process does apply to this particular form of proceeding, then in order to lessen the administrative burden associated with such procedures, there would have to be a "mutual accommodation" between the needs and objectives of a Department of Corrections and any liberty or property interest of an inmate. *Wolff v. McDonnell, supra* at 556. In view of what should be the non-adversarial nature of such a proceeding, California would urge that the procedures such as it now employs are more than sufficient to safeguard and probably more than are necessary to protect any cognizable liberty or property interest.

The present departmental procedures reflect development by California of its internal administrative decision-making process. This development has taken into account both the needs of the prisoner and those of the prison system and is the result of calculated experimentation as well as day-to-day experience. Any application of additional procedural protection would unnecessarily encumber and make more difficult the decision-making process which in California, for example, involves three state agencies. Furthermore, it would cast the entire process into one of an adversary nature, particularly if this Court were to agree with the three-judge court below in requiring counsel at all such proceedings, something which this Court refused to require in its decisions in *Morrissey v. Brewer, supra; Gagnon v. Scarpelli, supra;* and *Wolff v. McDonnell, supra.* If this full range of process was required then the administrative burden could well become overpowering.

The full spectrum of procedural protection that the three-judge court would impose would generate hostility and antagonism between the prisoner and prison officials at an obviously delicate stage in the prisoner's

confinement, and possibly hinder his rehabilitation and recovery from any mental condition that might exist. Such a situation would clearly be to the detriment of all parties and would be the very form of "great unwisdom" which this Court rejected as being "an inflexible constitutional straitjacket" in the *Wolff* decision. *Wolff v. McDonnell, supra* at 563. To do what the court below requires would find the judiciary entangling itself in discretionary matters that are within the expertise of correctional authorities (see *Meachum v. Fano, supra* at 229) and supervising the daily functions of correctional authorities, a result which would be directly contrary to previous holdings of this Court (See *Cruz v. Beto,* 405 U.S. 319, 321 (1972); *Jones v. North Carolina Prisoners Labor Union, Inc.,* ..... U.S. ....., 97 Sup.Ct. 2532, 2538 (1977); *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974)).

Accordingly, it is submitted that "[t]he better course at this time, in a period when prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell, supra* at 569.

For all of the above reasons, we submit that should this Court determine that the due process clause of the Fourteenth Amendment to the United States Constitution is and should be applicable at state correctional administrative determinations concerning transfers of inmates with mental disease or defects from correctional institutions to mental health facilities, then the development of such procedures and

standards should remain with the officials of the state prisons.

CONCLUSION

The judgment of the three-judge district court should be reversed and the matter should be remanded with directions that the action be dismissed because the due process clause of the Fourteenth Amendment of the United States Constitution is not implicated by state administrative transfer proceedings of inmates between correctional and mental health facilities when inmate placement in the latter is within the contemplation of the sentence imposed by conviction under the laws of the state.

Dated, March 17, 1978.

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(Appendices Follow)

Appendices

Appendix A

PENAL CODE OF THE STATE OF CALIFORNIA

§ 2684. Transfer to state hospital; duration of treatment

Text of section operative until July 1, 1978.

If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Health, the Director of Corrections, with the approval of the Community Release Board for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the Director of Health who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the Director of Health so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital.

(Added by Stats.1941, c. 106, § 15. Amended by Stats. 1953, c. 1666, § 10; Stats.1965, c. 483, § 1; Stats.1977, c. 165, § 32.)

For text of section operative July 1, 1978, see § 2684, post.

§ 2684. Transfer to state hospital; duration of treatment

Text of section operative July 1, 1978.

If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Community Release Board for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the Director of Health so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital.

§ 2685. Receipt of prisoner; administrative procedure; return to prison; time of hospitalization as part of sentence

Upon the receipt of a prisoner, as herein provided, the superintendent of the state hospital shall notify the Director of Corrections of that fact, giving his name, the date, the prison from which he was received, and from whose hands he was received. When in the opinion of the superintendent the mentally ill, mentally deficient or insane prisoner has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, the superintendent shall immediately notify the Director of Corrections of that fact. The Director of Corrections shall immediately send for, take and receive the prisoner back into prison. The time passed at the state hospital shall count as part of the prisoner's sentence.

Appendix B

INMATE CLASSIFICATION MANUAL OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS

Transfer of Prisoners to the State Department of Health

Chapter 12 Article 1

Article 1—Prisoners Who May be Transferred

Sec. 1200. *Authorization.* Section 2684 of the California Penal Code provides for transfer of mentally ill, mentally deficient or insane prisoners to the Department of Health if in the opinion of the Director of Corrections rehabilitation may be expedited by treatment at any one of the state hospitals under the jurisdiction of the Department of Health.

Sec. 1201. *Criteria.* To be transferred to the state hospitals of the Department of Health inmate patients should:

(a) Have a psychiatric condition requiring care and treatment not available in the Department of Corrections but available in state hospitals; or

(b) Have a deteriorating psychiatric condition which can be slowed, stabilized or improved through care and treatment available in a state hospital;

(c) Be controllable within the hospital's security system;

(d) Have potential for achieving one of the benefits of (a) or (b) above within approximately six months.

Sec. 1202. *Procedure.* (a) Recommendations for transfer will be processed by the institutional classification committee for approval by the Chief Medical Officer and will contain the following information:

(1) A psychiatric evaluation made within the past three months.

(2) Psychiatric history.

(3) Social and family history.

(4) Arrest and conviction history.

(5) History of institutional behavior in the criminal justice system.

(6) Summary of psychiatric treatment given within the Department of Corrections, and effect.

(7) Objectives expected to be met by transfer and the criteria for return to CDC or placement.

(b) If approved by the Chief Medical Officer, the inmate's name and number will be listed on CDC Form 242, Transfer Order, and forwarded with a copy of CDC 128-G, Classification chrono, a copy of an up-to-date cumulative case summary including the latest psychiatric report and a copy of Form MH 1746, PC 2684 Transfer Information Form and sent to the Chief, Classification Services for review.

(c) Upon approval by classification staff of inmate(s) listed on CDC Form 242, the transfer order will be routed to:

(1) The Adult Authority or the Women's Board of Terms and Parole for approval.

(2) The Chief, Medical Services for certification.

(3) The Director of Health for authorization.

(4) The Director and/or Deputy Director-Institutions for signing of the transfer order.

Sec. 1203. *Emergency Cases.* In emergency cases, telephone approval for immediate transfer of seriously disturbed female inmates may be obtained from the Women's Board of Terms and Parole. Telephone or teletype request should then be made to the Director of Corrections. The Chief of Medical Services and the Chief, Classification Services are authorized to approve such transfers for the Director of Corrections after obtaining authorization from the Director of Health.

Sec. 1204. *Hub Institutions.* (a) The following institutions are designated as "Hub Institutions" to provide services for California Department of Corrections male felons housed in Department of Health facilities:

(1) California Medical Facility—
Napa State Hospital.

(2) California Mens Colony—
Atascadero State Hospital.

(3) California Institution for Men—
Patton State Hospital.

(b) Records for each man housed by the Department of Health will be kept by the respective "Hub Institutions." The hub institution will also be responsible for all contacts with the specified Department of Health facility, including securing reports, scheduling for Adult Authority consideration, and California Department of Corrections parole and discharge procedures.

Sec. 1205. *Records.* The following records shall accompany each inmate transferred from the Department of Corrections to the Department of Health: (a) A letter from the warden/superintendent which includes sentencing information, date of arrival, offense, board actions and release date. Attached to this letter will be a copy of CDC Form 242, Transfer Order, a recent psychiatric report, a list of visitors and correspondents, a summary of recent conduct if not included in the cumulative case summary. This material will be retained at the state hospital.

(b) The medical and psychiatric files together with the inmate central file after removal of the commitment, CDC Form 112, Summary of Sentence Data, the master copy, and extra copies of the cumulative case summary.

(c) Items in (b) above are to be returned to the Hub Institution within 60 days after inmate is received in the Department of Health. The transferring institution will clearly label the material to assure return to proper hub institution and request the material be returned within 60 days.

(d) The superintendent of the state hospital will be contacted by the warden/superintendent prior to making a transfer in order that satisfactory arrangements may be made for delivery.

Sec. 1206. *Progress Reports on Prisoners in State Hospitals.* (a) Ninety days prior to the scheduled calendar appearance of an inmate who has been transferred to a state hospital, a request for a current progress report will be forwarded to the appropriate hospital superintendent.

(b) Once each year, 90 days prior to the anniversary of the date of transfer of condemned prisoners or prisoners not scheduled for annual calendar appearance, a similar request will be forwarded to the appropriate hospital superintendent.

(c) Two copies of CDC Form 280, Department of Health Progress Report, pre-printed master sets and two blank master sets will be forwarded with each request to a hospital superintendent for a progress report. The letter of request will ask that the progress report be typed on the master sets.

(d) Department of Health progress reports for inmates appearing on calendars will be duplicated and presented for review by the Adult Authority. Department of Health progress reports on cases not scheduled for regular calendar appearances will be duplicated and added to the cumulative case summary after review by the appropriate institutional staff. One copy of this report will be forwarded to the Director of Corrections for retention in the central office inmate file. Department of Health progress reports on condemned cases will be duplicated and added to the cumulative case summary after review by the appropriate institutional staff. Three copies of this report will be forwarded to the Director of Corrections in

the same manner as other reports on condemned prisoners.

Sec. 1207. *Return of Prisoners to CDC.* Section 2685 of the Penal Code makes provisions for the return of prisoners from state hospitals.

(a) When in the opinion of the superintendent, the mentally ill, mentally deficient or insane prisoner has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, he shall immediately notify the Director of Corrections to that effect.

(b) Procedures to Follow:

(1) The Director of Health forwards a letter to the Director of Corrections requesting the return of the prisoner to a Department of Corrections facility.

(2) This request is sent to the Chief, Classification Services for logging in a control file.

(3) The request, with progress reports and any other pertinent information is forwarded to the Assistant Superintendent, Psychiatric Services at the California Medical Facility for review and recommendations as to which facility the prisoner should be returned. His recommendation is returned to the Chief of Classification Services.

(4) The departmental transportation officer will be notified, by the Chief Classification Services, to arrange the return of the prisoner to the designated Department of Corrections facility.

Sec. 1208. *Discharge of Mentally Disordered Persons.* Before discharging any person who is a danger to others as a result of mental disorder, the Director of Corrections may place, or caused to be placed upon reasonable cause, the person in a facility designated by a county and approved by the Department of Health as a facility for 72-hour treatment and evaluation or in a 14-day intensive treatment facility pursuant to the Lanterman-Petris-Short Act. (See Penal Code Section 2960 as approved by 1970 legislature.)

Article 3—Classification Committees: General Considerations

Sec. 404. *General Procedures.* (a) The committee will use the central file, information presented by the inmate, and any pertinent reports available.

(b) The inmate will make a personal appearance before the committee when feasible to participate fully and present a personal point of view or submit documents bearing on the proposed committee action. The reasons for any non-appearance will be documented.

(c) A CDC Form 128-G will be prepared and a copy given to the inmate in conformance with casework information validity and confidentiality procedures.

(d) Committee decisions will be reached through group discussion and agreement. Subcommittees will refer cases in which agreement cannot be reached to the next higher committee.

(e) The committee is to notify the inmate and relevant institution personnel of actions taken.

(f) The warden/superintendent can defer actions of the committee if the safety of the institution requires this.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

APPELLANTS' BRIEF ON THE QUESTION OF MOOTNESS

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Neb.Rev.Stat. §83-1,107.01 (Reissue 1976)	2
Neb.Rev.Stat. §83-1,108 (Reissue 1976)	2, 3
Neb.Rev.Stat. §83-1,116 (Reissue 1976)	6
Neb.Rev.Stat. §83-1,118 (Reissue 1976)	3

The plaintiff-intervenor, Larry D. Jones (appellee), was convicted of the crime of robbery and sentenced to the Department of Correctional Services of the State of Nebraska for a term of three to nine years from the District Court of Douglas County, Nebraska, which sentence he commenced serving in the Nebraska Penal and Correctional Complex on May 30, 1974 (R73; attached Ex. A). The crime of robbery is punishable by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than three years and not more than fifty years. (Neb.Rev. Stat. §28-414 (Reissue 1976).)

The maximum term of the appellee's indeterminate sentence expires on May 20, 1983.

Of course, there are possibilities of accumulating "good time" while serving a sentence. Neb.Rev.Stat. §83-1,107 (Reissue 1976), provides:

> "(1) The chief executive officer of a facility shall reduce for good behavior the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:
>
> "(a) From his minimum term, to determine the date of his eligibility for release on parole; and
>
> "(b) From his maximum term, to determine the date when his discharge from the custody of the state becomes mandatory.
>
> "(2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited,withheld and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding the charges of misconduct.
>
> "(3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld and restored by the

Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director.

"(4) Good time or other reductions of sentence granted under the provisions of any law prior to August 24, 1975 may be forfeited, withheld, or restored in accordance with the terms of this act."

Assuming Jones has accumulated the maximum, for purpose of argument, he would have a total of eleven months as of May 30, 1978, under this provision.

Neb.Rev.Stat. §83-1,107.01 (Reissue 1976), provides:

"(1) In addition to the reductions provided in section 83-1,107, an offender shall receive, for faithful performance of his assigned duties, a further reduction of five days for each month of his term. The total of all such reductions shall be deducted from his maximum term to determine the date when his discharge from the custody of the state becomes mandatory.

"(2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld, and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding any charges of misconduct.

"(3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld, and restored by the Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of the conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director."

Again assuming the maximum accumulation, Jones would have 240 days or eight months as of May 30, 1978, under this provision. Thus, under the above two statutes Jones could accumulate nineteen months to come off his maximum term or a discharge date of December 30, 1981. His tentative discharge date at this time is actually March 28, 1982 (Ex. B attached).

Neb.Rev.Stat. §83-1,108 (Reissue 1976), provides:

"(1) The Board of Parole shall reduce for good conduct in conformity with the conditions of his parole, a parolee's parole term by two days for each month of such term. The total

of such reductions shall be deducted from his maximum term, less good time reductions granted under the provisions of sections 83-1,107 and 83-1,107.01, to determine the date when his discharge from parole becomes mandatory.

"(2) Reductions of the parole terms may be forfeited, withheld, and restored by the Board of Parole after the parolee has been consulted regarding any charge of misconduct or breach of the conditions of his parole."

Another twenty-four days a year could be earned here since Jones went on parole, but this would be insignificant on the present question.

All of the foregoing is, of course, speculative at this time. In addition, at the time Jones was sentenced all institutional good time was deducted only to determine eligibility for parole, but not from the maximum term to determine the discharge date (83-1,107 (Reissue1971)). This statute was amended to its present form in 1975 and is treated by the state as not retroactive. The foregoing three statutes are all of the Nebraska "good time" provisions.

Neb.Rev.Stat. §83-1,118 (Reissue 1976), provides:

"(1) If, in the opinion of the Board of Parole, a parolee does not require guidance or supervision, the board may dispense with and terminate such supervision.

"(2) The Board of Parole may discharge a parolee from parole at any time if such discharge is compatible with the protection of the public and is in the best interest of the parolee.

"(3) The Board of Parole shall discharge a parolee from parole when the time served in the custody of the Department of Correctional Services and the time served on parole equals the maximum term less all good time reductions granted in accordance with the provisions of this act.

"(4) The Department of Correctional Services shall discharge a legal offender from the custody of the department when the time served in the facility equals the maximum term less all good time reductions granted in accordance with the provisions of this act.

"(5) Whenever any committed offender shall have completed the lawful requirements of his sentence, the Director of Correctional Services shall issue a certificate of discharge to such offender, and such certificate shall restore the civil rights of such committed offender as though a pardon had been issued."

As will readily be seen, subsections (3) and (4) of the above section are the only two portions thereof which determine as of statutory right when the appellee would be entitled to a discharge. If he were on parole at the time his maximum sentence is served less good time credits, the Parole Board must discharge him; if he is in the custody of the department when his maximum term less good time expires, the department must discharge him. In either of the above cases the Director of Correctional Services then issues a certificate of discharge which restores the civil rights of the offender as though a pardon had been issued.

In November, 1977, shortly after the injunction issued in this case, appellee Jones was placed on a very limited parole "to obtain inpatient psychiatric medical services" at the Veterans' Administration Hospital "only," Danville, Illinois (Ex. C attached). He is presently under investigation for violation of even this limited assignment.

The judgment of the United States District Court in the present case not only finds that Neb.Rev.Stat. §83-180(1) (Reissue 1976) is unconstitutional but enjoins the defendants from transferring appellee Jones to the Lincoln Regional Center without following the mandated procedures at any time before his complete discharge from the State of Nebraska. The three-judge court was aware when said order was entered that Jones was back in the Penal Complex. The judgment provides in part:

> "1. That §83-180(1), Nebraska R.R.S. 1943, is declared to be unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law;
>
> ". . . .
>
> "3. That the defendants are enjoined from transferring the plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal sentence which he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes each of the following: . . ."

The appellants claim not only the right to transfer the appellee for examination, study and treatment at the Lincoln Regional Center in accordance with §83-180, supra, so long as he remains in the custody of the state, but also they consider the statutory procedure the better and intend to follow it "but for" the injunction. Appellants are also under duty to protect the citizens under the statutes of the State of Nebraska. Insofar as the duty to the citizens of the state, Neb.Rev.Stat. §83-171 (Reissue 1976), provides:

> "There is hereby created a Department of Correctional Services which shall:
>
> "(1) Maintain and administer the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, the Youth Development Center-Kearney and the Youth Development Center-Geneva and such other facilities as may be required for the custody, control, correctional treatment and rehabilitation of persons committed to the department, and for the safekeeping of such other persons as may be remanded thereto in accordance with law;
>
> "(2) Supervise persons committed to the department on parole and administer parole services in the facilities and in the community; and
>
> "(3) Develop policies and programs for the correctional treatment and rehabilitation of persons committed to the department."

While the Parole Board has legal custody of an inmate on parole, the appellant Vitek's department supervises persons on parole.

Neb.Rev.Stat. §83-173 (Reissue 1976), provides in part as follows:

> "The Director of Correctional Services shall:
>
> ". . . .
>
> "(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;
>
> ". . . .
>
> "(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176."

Neb.Rev.Stat. §83-1,116 (Reissue 1976), provides in part:

> "(1) When a committed offender is released on parole, the Board of Parole shall require as a condition of his parole that he refrain from engaging in criminal conduct. The board may also require, either at the time of his release on parole or at any time while he remains on parole, that he conform to any of the following conditions of parole:
>
> ". . . .
>
> "(f) Submit himself to available medical, psychological, psychiatric or other treatment."

The present situation is clearly distinguishable from cases considering whether or not a prison inmate is entitled to certain due process procedures on the question of obtaining a parole. This Court has, of course, found such recent cases as New York State Parole Board v. Coralluzzo, No. 77-567 (March 6, 1978), and Scott v. Kentucky Parole Board, 429 U.S. 60 (1976), as possibly moot because a parole was granted by the time the case reached this court.

In the Coralluzzo case the lower court had ordered the parole authority to follow certain due process procedures in setting the minimum period of imprisonment (MPI) of Coralluzzo which would pave the way for the inmate's parole. In Scott the lower court had found that due process procedures were unnecessary and denied granting an injunction against the Parole Board. The grant of parole was determined to have cured the problem in both cases.

In the present case the three-judge court has enjoined appellant prison authorities from transferring the appellee prison inmate without following the procedures ordered, at any time before his complete discharge from the custody of the State of Nebraska from the criminal sentence which he is now serving.

This is an existing and immediate restraint upon the full and complete exercise of the rights and duties of the prison authorities and the State of Nebraska as conferred and assigned to them by the legislative arm of the state. Whether appellee Jones is on a limited parole to another mental hospital (as he is now) or assigned to some other facilitity, he remains in the

custody of the State of Nebraska. The only circumstances which would relieve the appellants of said injunction would be a complete discharge or death of appellee Larry D. Jones. Discharge will not come about as of any right of appellee Jones until several years from the present time.

The appellants consider, because appellee Jones' history of mental illness indicates a serious threat to his own safety, as well as to that of others, and the number of years he has left to serve before he is entitled to a complete discharge, that there is a very real expectation that the situation which the lower court termed "wrong" will recur; therefore the need for both the appellants and appellee to have a determination of the legal procedure continues to exist. The situation is similar to the rule often followed by this Court as stated in United States v. W. T. Grant Company, 345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct. 894, which involved an action brought by the United States to enjoin one from holding interlocking directorships. In that case the specific interlocks charged had been voluntarily terminated and defendants disclaimed any intention to resume them. While the Supreme Court held that the lower court was within its discretion in dismissing the case, it emphasized that voluntary cessation of allegedly illegal conduct did not make a case moot. This Court further stated:

> ". . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . ."

The Court then went on to state:

> "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one. . . ."

In the more recent case of NLRB v. Raytheon Co., 398 U.S. 25, 26 L.Ed.2d 21, 90 S.Ct. 1547, the lower court held in a labor dispute that an intervening election in compliance with the Labor Relations Board's order made the case moot. This Court, however,

held that the employer's compliance with the order of the Board did not render the cause moot depriving the Board of its opportunity to secure enforcement from a court. This Court, quoting from United States v. W. T. Grant Company, supra, went on to state:

> "Undoubtedly, as the Court recognized in NLRB v Jones & Laughlin Steel Corp., 331 US 416, 428, 91 L Ed 1575, 1582, 67 S Ct 1274, reh den 331 US 868, 91 L Ed 1872 (1947), there are situations where an enforcement proceeding will become moot because a party can establish that 'there is no reasonable expectation that the wrong will be repeated.' . . . Nothing in the record here shows that the specific acts complained of have not been repeated or gives any assurance that they will not be repeated in the future. Cf. United States v Concentrated Phosphate Export Assn., 393 US 199, 203, 21 L Ed 2d 344, 348, 89 S Ct 361 (1968); Wirtz v Local 153, Glass Blowers Assn., 389 US 463, 474-475, 19 L Ed 2d 705, 714, 88 S Ct 643 (1968)."

As stated earlier, appellants feel that it is very likely that the acts complained of in the present case would be repeated by appellants but for the injunction and that it is legally right and proper that appellants do so.

In another labor case involving a private company and guards at a company plant during World War II who were primarily military in nature in which the company had refused to bargain with a union selected by the militarized plant guards, the NLRB ordered the company to bargain. Subsequent to the company's refusal to bargain, the guards were demilitarized and the question arose whether this made the Board's order moot. This Court stated in part:

> ". . . The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.
>
> "The Board's order moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. . . ." NLRB v. Atkins, 331 U.S. 398, 91 L.Ed. 1563, 67 S.Ct. 1265.

It appears to us that the injunction in the present case is a continuing direction to follow the due process procedures mandated until appellee Jones is discharged from custody of the State of Nebraska similar to that in the above case and that all parties and the public have an "interest in having the legality of the practices settled. . . ." United States v. W. T. Grant Co., supra.

In DeFunis v. Odegaard, 416 U.S. 312, 40 L.Ed.2d 164, 94 S.Ct. 1704, the plaintiff had been denied admission to a law school and brought suit on his own alleging discrimination and requesting a mandatory injunction to require the school to admit him.

The lower court issued the injunction and he was admitted. However, by the time the appeal of the law school reached this Court plaintiff was about to graduate and counsel for the law school made it clear that the law school would not in any way seek to abrogate plaintiff's registration. This Court stated in part:

> "There is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' . . . These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the admissions procedures of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance 'that "there is no reasonable expectation that the wrong will be repeated."' United States v W.T. Grant Co. supra, at 633, 97 L Ed 1303. Otherwise, '[t]he defendant is free to return to his old ways,' id., at 632, 97 L Ed 1303, and this fact would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled.' Ibid. But mootness in the present case depends not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled."

We believe the situation in the present case is very similar to what this Court said DeFunis was not in the above quote; that is, the appellants in the present case have not voluntarily ceased its transfer practices, there is a reasonable expectation that the wrong will be repeated, but for the injunction, the appellants are likely to return to their "old ways" and the appellee Jones is nowhere near a final discharge or recovered from his mental illness.

In the DeFunis case the Court went on to discuss another principle, stating:

> "It might also be suggested that this case presents a question that is 'capable of repetition, yet evading review,' Southern Pacific Terminal Co. v ICC, 219 US 498, 515, 55 L Ed 310, 31 S Ct 279 (1911); Roe v Wade, 410 US 113, 125, 35 L Ed 2d 147, 93 S Ct 705 (1973), and is thus amenable to federal adjudication even though it might otherwise be considered moot. . . ."

While it was determined in the DeFunis case that such a situation did not or would not probably exist, it is most likely in the present case and in the prison situaton. If the mere granting of a limited parole can moot the question of the proper procedures for transfer to a mental institution within the prison system, even though the prisoner will for several years remain in the legal custody of the state, repetition without review is inevitable, because it is within the policy and goals of the public and the penal authorities to grant early paroles--especially for outside psychiatric services.

In Gray v. Sanders, 372 U.S. 368, 9 L.Ed.2d 821, 83 S.Ct.801, a qualified voter in both primary and general elections, brought an action to restrain the use of the state's county unit system as a basis for counting votes in the Democratic Primary for a United States Senator and state-wide officers.

Thereafter the Democratic Party voted to hold the 1962 election on a popular vote basis. An injunction was issued against following the 1962 Act including the state's county unit system. This Court stated:

> ". . . But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . . [their] old ways.' United States v W. T. Grant Co. 345 US 629, 632, 97 L ed 1303, 1309, 73 S Ct 894."

So in the present case the lower court has enjoined the appellants from following Neb.Rev.Stat. §83-180 (Reissue 1976), the statute which gives them the procedure for transfer, and if the complaint is dismissed, said section would govern future transfers, including, very likely, appellee Jones.

In Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 40 L.Ed.2d 1, 94 S.Ct. 1694, an employer, whose plants had been struck by a labor union,brought an action for declaratory judgment and an injunction against state welfare officials to prevent the determination of eligibility of the strikers to receive welfare benefits while on strike. The strike ended and it was contended that the case was therefore moot. This Court stated in part:

> ". . . To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining arrangement, except one involving a fine or other penalty, could be adjudicated only rarely, and the purposes of the Declaratory Judgment Act would be frustrated."

Because the appellants contend that the policy contained in the statute in question is the proper and best procedure, they continue to assert an immediate and definite governmental policy that has adversely affected and continues to affect a present interest every bit as much as the interest of the strikers and/or the welfare officials were in that case.

We emphasize, as we did in the Jurisdictional Statement, that the three-judge court rendering the judgment in the present case consisted of two of the three district judges for the District of Nebraska and a judge from the United States Court of Appeals for the Eighth Circuit. If this judgement is permitted to stand, the officials of the Department of Correctional Services and the Department of Public Institutions will be constrained to follow its burdensome procedures, not only in every case of a transfer of a prison inmate to a mental hospital, but also in transfers of other inmates to facilities outside the Department of Correctionsl Services under the threat or fear of forfeiting their qualified immunity (thus encouraging actions for damages) for knowing failure to follow this precedent in the district.

Obviously, if they cannot transfer Larry D. Jones, appellee, while he is in custody, they cannot, without such procedure, transfer any other prison inmate for similar treatment or rehabilitation.

We realize that the last paragraph does not technically relate directly to the mootness issue, but from a common sense, realistic view, this is a very important consideration in the minds of the individuals called upon to operate the prison system.

Alternatively to all the above, should the Court dismiss for mootness, we respectfully pray that the Judgment of the lower court be dismissed and vacated to assure the appellants not only their freedom to act as to the present appellee, but also that this case not become res judicata to future actions.

Respectfully submitted,

PAUL L. DOUGLAS, Attorney General
State of Nebraska

By Melvin Kent Kammerlohr
Melvin Kent Kammerlohr
Assistant Attorney General
Members of the Bar of the
Supreme Court of the United States
2115 State Capitol Building
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Appellants

THE STATE OF NEBRASKA,	Plaintiff,		JUDGMENT AND SENTENCE
vs.		89-41	INFORMATION: Robbery
Larry Dean Jones,	Defendant,		

Now, on this day, comes the County Attorney on behalf of the State of Nebraska. The defendant, Larry Dean Jones, present in Court with counsel J. Cripe.

Thereupon, said defendant is arraigned for sentence upon his plea of guilty to the charge of Robbery, as heretofore entered herein, and is informed by the Court of the nature of his said plea, of the consequences thereof, and of the penalty attached by law thereto; and, after being thus advised and instructed, the said defendant still adheres to his said plea of guilty and says he desires to stand thereon. Whereupon, said defendant is inquired of if he has anything to say why judgment should not be pronounced against him. Showing no good and sufficient cause why such judgment should not be pronounced,

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, Larry Dean Jones, be taken hence to the Douglas County Jail and that thence within thirty (30) days and as early as practicable, he be delivered by the Sheriff of Douglas County to the NEBRASKA PENAL AND CORRECTIONAL COMPLEX, in Lancaster County, Nebraska, for imprisonment at hard labor, for an indeterminate period of not less than Three (3) years nor more than Nine (9) years, this 31st day of May A. D. 1974, no part of which said period of time is by virtue of this sentence to be spent in solitary confinement and that he pay the costs of this prosecution, taxed at $_____.

Said sentence to commence on February 9, 1974.

Honorable THEODORE L. RICHLING Judge Presiding

EX. A

STATE OF NEBRASKA, }
COUNTY of DOUGLAS } ss.

I, MARVIN S. REIFSCHNEIDER, Clerk of the District Court, Fourth Judicial District of Nebraska, within and for said County, do hereby certify that the above and foregoing is a true and correct copy of JUDGMENT AND SENTENCE rendered and entered of record on the 31st day of May, 1974 in Journal 1214 on the date aforesaid and designated as Criminal Docket 89 Number 41, in a cause in said Court wherein THE STATE OF NEBRASKA is

Plaintiff and LARRY DEAN JONES is

Defendant as the same appears fully upon the records and in the files of said court now in my charge remaining as Clerk aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand officially and affixed the seal of said Court at Omaha, this 31st day of May, A. D. 19 74.

MARVIN S. REIFSCHNEIDER
Clerk

BY Marie S Domisch Clerk
Deputy

Doc. CR 89 Page 41

The State of Nebraska,

Plaintiff,

vs.

Larry Dean Jones,

Defendant.

I hereby certify that this is a true copy of the original writ with all the endorsements thereon.
THEODORE J. JANING,
Sheriff

By _____ Deputy

Certified Copy

JUDGMENT AND SENTENCE

From the
District Court of Douglas County
OMAHA, NEBRASKA

J. James Exon, Governor

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Robert F. Parratt
Warden

NEBRASKA PENAL & CORRECTIONAL COMPLEX
P. O. Box 81248, Lincoln, Nebraska 68501

April 4, 1978

STATEMENT

RE: JONES, Larry NP&CC #29327

I, James R. Lyons, office manager and custodian of records for the Nebraska Penal and Correctional Complex, do hereby certify that the following information is furnished from our permanent records:

Mr. Larry Jones #29327 was received and began a sentence of three to nine years on May 31, 1974 on commitment from the District Court of Douglas County Nebraska.

He was paroled on November 17, 1977. His tentative discharge from parole presently reads March 23, 1982.

I further certify that the attached copies of the commitment and the parole agreement are exact copies of those contained in our official files.

James R Lyons

JAMES R. LYONS
Records and Office Manager
Nebraska Penal & Correctional Complex

Subscribed to and sworn before me this 4th day of April, 1978.

Dept. of Justice

APR 4 1978

State of Nebraska

EX. B.

STATE OF NEBRASKA
BOARD OF PAROLE

CERTIFICATE OF PAROLE

WHEREAS, the Nebraska Board of Parole acknowledges that,

Larry Dean Jones No. NPCC# 29327 presently confined at the Nebraska Penal and Correctional Complex is eligible for parole.

WHEREAS, the Board of Parole, after careful consideration, believes that there is a reasonable probability said individual will lead a law abiding life and further believes that the release of said individual on parole is compatible with the welfare of society:

NOW, THEREFORE, be it known that the Nebraska Board of Parole, under the authority vested in it by law, does grant said subject's release on parole from said institution at such time as a satisfactory parole program has been established by the Parole Administration. Upon being paroled and released, said parolee shall be in the legal custody and under the control of the *Nebraska Board of Parole,* subject to the rules, regulations and conditions of parole as set forth in this document.

Signed in quadruplicate this 17th day of November 19 77

CHAIRMAN

(Over)

CONDITIONS OF PA OLE

ABSCONDING: I WILL KEEP MY PAROLE OFFICER ADVISED OF MY WHEREABOUTS AT ALL TIMES. L.D.J.

LAWS: I will obey all laws, ordinances and orders. If arrested, for any reason, I will INITIAL immediately contact my parole officer.

ASSOCIATES: I will refrain from associating with persons known to me to be engaged in criminal activities, or of questionable character or, without written permission of my parole officer, with persons known to me to have been convicted of a crime.

WEAPONS, NARCOTICS, ALCOHOL: I will not own, possess, use or sell any dangerous weapon or illegal narcotic /OR CONTROLLED SUBSTANCE nor will I be found under the influence of alcohol during this period of parole.

DIRECTIVES: I will immediately contact my parole officer upon being granted a parole. I will submit a monthly report to him by the fifth day of each month and will report in person at such time and place as my parole officer requests and will follow his directives.

TRAVEL: I will receive a travel permit before leaving the State of Nebraska and will receive verbal permission of my parole officer before leaving the county to which I am paroled. (IT IS A FELONY FOR A PAROLEE TO LEAVE THE STATE WITHOUT WRITTEN PERMISSION; PUNISHABLE BY UP TO FIVE YEARS IMPRISONMENT.)

EMPLOYMENT/ RESIDENCE: I will maintain acceptable full-time employment and approved residence during this period of parole; and, I will receive my parole officer's permission prior to changing either my employment or residence. My immediate placement upon being granted a parole is: Not required (Employment)

V.A. Hospital, Danville, Illinois (To obtain in-patient, psychiatric medical services) (Residence)

FINANCIAL OBLIGATIONS: I will provide for the financial needs of my family and will not incur any unnecessary debts.

SEARCH AND SEIZURE: I will permit my parole officer to inspect my residence, place of employment, or vehicle at his request.

SPECIAL CONDITIONS: Upon arrival report in person to: Urbana Parole Office, Phone: (217) 333-8433. PAROLE TO THE V.A. HOSPITAL ONLY. ANY PROGRAM TERMINATION WITHOUT AGREEMENT FROM HOSPITAL STAFF AND PAROLE AUTHORITIES WILL BE GROUNDS FOR PAROLE REVOCATION ACTION.; and, also,

Ck.	Init.	
—	———	Will submit to medical/psychological treatment.
—	———	Will attend marriage counseling sessions.
—	———	Will not consume alcohol.
—	———	Will not own or drive a vehicle.
—	———	Will not apply for credit cards/checking accounts.
—	———	Will not marry without advanced approval of the Board of Parole.

I, Larry Dean Jones NPCC# 29327, an inmate of the Nebraska Penal & Correctional Complex hereby declare that I have carefully read, or heard read, and do clearly understand the contents and conditions of the above parole, and, I hereby accept the same, and do pledge myself to faithful compliance of said conditions. I fully understand that if while under parole status I am charged for an alleged violation(s) of the conditions of my parole, I shall be afforded a Probable Cause Hearing. I also fully understand that the Board of Parole may order my return to the appropriate correctional facility to answer any alleged violation charge(s) and do hereby agree to freely and voluntarily accompany any Board of Parole representative from any location in the United States to this appropriate facility. I also fully understand that if it is determined by the Board of Parole that I have violated the conditions of my parole, said parole may be revoked, and/or in addition any and all good time given towards the reduction of my sentence may be forfeited or withheld by the Parole Administrator, with the approval of the Director of the Department of Correctional Services. I hereby freely waive all formality of legal proceedings and shall willingly return to the appropriate Nebraska correctional facility, without the Governor's requisition, when such return is ordered by the Board of Parole.

Donald L. Parker — 11-17-77 (DATE) — WITNESS

Larry D. Jones — 11-17-77 (DATE) — PAROLEE'S SIGNATURE

EX. C

FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

RECEIVED
APR 19 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 77-888

JOSEPH VITEK, etc., et al.,

Appellants,

v.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MEMORANDUM OF APPELLEE SUGGESTING THAT THE CAUSE IS NOT MOOT

THOMAS A. WURTZ
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Court-appointed
Attorney for Appellee Larry D. Jones

CASES CITED

	Page
Benton v. Maryland, 395 U.S. 784 (1969)	5
Carroll v. President and Commissioners, 393 U.S. 175 (1969)	3
DeFunis v. Odegaard, 416 U.S. 312 (1974)	8
Fiswick v. United States, 329 U.S. 211 (1946)	5
Ginsberg v. New York, 390 U.S. 629 (1968)	5
Morgan v. United States, 346 U.S. 502 (1953)	5
Pollard v. United States, 352 U.S. 354 (1956)	5
Preiser v. Newkirk, 422 U.S. 395 (1975)	8
Roe v. Wade, 410 U.S. 113 (1973)	7
Sibron v. New York, 392 U.S. 40 (1956)	4
Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911)	6
Street v. New York, 394 U.S. 579 (1969)	5
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)	3, 9
United States v. W.T. Grant Co., 345 U.S. 629 (1953)	7

REFERENCES

Kates and Barker, MOOTNESS IN JUDICIAL PROCEEDINGS: TOWARD A COHERENT THEORY, 62 Cal. L. Rev. 1384 (1974)

Note, MOOTNESS DOCTRINE IN THE SUPREME COURT, 88 Harv. L. Rev. 373 (1974)

STERN & GROSSMAN, SUPREME COURT PRACTICE, (Fourth Edition, 1969)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-888

JOSEPH VITEK, etc., et al

Appellants,

v.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MEMORANDUM OF APPELLEE SUGGESTING THAT THE CAUSE IS NOT MOOT

The appellee pursuant to the request of this Court files this memorandum to advise the Court of certain facts which, in the appellee's view, do not render this cause moot.

The court below enjoined the defendants from transferring the Plaintiff-Intervenor Larry D. Jones from the Nebraska Penal and Correctional Complex to the Lincoln

Regional Center at any time before his complete discharge from the custody of the State of Nebraska. On November 17, 1977, Larry Jones was granted what the state has termed a very limited parole to obtain inpatient psychiatric medical services at the Veterans Hospital in Danville, Illinois. The parole was limited to the Veterans Hospital only, and any termination of this program without prior approval from hospital staff or parole authorities would be grounds for parole revocation action (Exhibit C, Appellants' Brief on Mootness). It is the contention of the appellee that he is still subject to transfer under the statute found unconstitutional by the court below. His transfer to the Veterans Administration Hospital was for all practical purposes not a "parole" as the term is commonly understood. He presently has no freedom to seek employment, move from the psychiatric wing of the hospital, or perform any of the functions that one would normally expect of a parolee. This parole may have been a fiction, disquising the state's attempt to recommit Larry Jones to a mental hospital, while circumventing the injunction of the court below. Since the state appears to be still interested in committing Larry Jones to a mental hospital, it would appear that a spirited controversy still exists before this Court.

The appellee contends that he is still suffering a "continuing harm." As the appellants' brief on mootness (p. 2) indicates, his tentative discharge date is March 28, 1982, with a possibility of release on December 30, 1981.

His limited parole, as the appellant also contends, does not remove him from the custody of the State of Nebraska. And since he is still deemed subject to the custody of the state, he is still subject to transfer under the statute found unconstitutional by the court below should the order of the court below be vacated. The order enjoins the state from transfer until ". . . complete discharge from the custody of the State of Nebraska on the Criminal Sentence which he is now serving. . . ." (Jurisdictional Statement, App. 2). As was earlier suggested, the limited parole has in effect allowed the state to recommit Larry Jones to another mental hospital. This is clearly a present and continuing injury.

There also exists the possibility that Larry Jones may have his parole revoked. If his parole were revoked after this Court had mooted this cause and vacated the judgment below, he would be forced to bring a subsequent lawsuit to prevent a transfer to the Lincoln Regional Center. This would cause useless expenditure of judicial resources.

In the case of Carroll v. President & Commissioners, 393 U.S. 175 (1969) a lower court had enjoined a political party from holding rallies for ten days. Although the order expired before the case reached this Court, the controversy was not deemed to be moot, because an affirmance of the decision by a lower appellate court might have an effect on the continued activities of the political party. In the case of Super Tire Engineering Co. v. McCorkle, 416

U.S. 115 (1974), this Court found not to be moot a controversy over a state's policy of providing welfare assistance to striking workers, because the decision would have an adverse effect on employers' future bargaining relationships with their employees, even though the immediate strike had ended.

In both of these cases a finding of a current controversy seemed to be based upon an expectation that a course of governmental conduct would continue. Surely the appellee's claim of a present injury in the case at hand is more injurious to his present well-being than the plaintiffs' in McCorkle and Carroll. The state has also indicated they would return to their earlier conduct, but for the injunction of the court below.

The appellee in the case at hand is also able to demonstrate injury which has arisen from the collateral consequences of the state's completed course of action in transferring him to a state mental hospital.

This Court, in criminal cases, has often proceeded to adjudicate the merits of cases even though the prisoners have already been released. The basis for such findings has rested on the fact that collateral consequences of criminal convictions still existed. In the case of Sibron v. New York, 392 U.S. 40, 55-56 (1968), this Court found that a possibility under state law that the prisoner's conviction could be later used to impeach his character at a later trial, should it ever be put to issue, prevented the case from being mooted.

In Ginsberg v. New York, 390 U.S. 629, 634 n. 2, it was noted that an obscenity conviction might result in the revocation of a license required by municipal law. The case was found not to be moot because of this possible collateral consequence. A similar holding is found in Morgan v. United States, 346 U.S. 502, 512-513 (1953), where it was noted that the results of a conviction may still persist, even though the prisoner had been released. In Fiswick v. United States, 329 U.S. 211, 221-222, the case was not deemed moot as the conviction of an alien created a possible hazard of later deportation and problems with later requirements for naturalization. In Pollard v. United States, 352 U.S. 354, 358 (1956), the Court indicated that the mere possibility of collateral consequences from the conviction was sufficient for the Court to treat the merits of the case. The effect of the conviction on loss of employment was noted in Street v. New York, 394 U.S. 579 (1969).

In Benton v. Maryland, 395 U.S. 784 (1969), a defendant was convicted of burglary and larceny, for the same act, and challenged the larceny conviction as being violative of the double jeopardy clause of the fifth amendment. Although the sentences ran concurrently, this Court held that the additional conviction on the defendant's record would most likely result in adverse consequences, therefore saving the case from mootness.

The Court, by its refusal to moot criminal cases which might involve subsequent civil disabilities, is in

essence taking note of the stigma which might attach to a convicted person. Likewise, Larry Jones has also suffered possible collateral consequences by his transfer to a state mental hospital. He has also suffered the stigmatizing effects of being labelled mentally ill and may suffer additional disabilities (see Brief of Appellee, pp. 27-28). If this Court can find continuing injury predicated on collateral consequences of a criminal conviction, it can surely by analogy make the same finding for confinement in mental hospitals.

The injury suffered by the plaintiff, if not found to be continuing by this Court, may well fall within the category of harm "capable of repetition, yet evading review", Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911). In Southern Pacific, supra., the I.C.C. issued a two-year injunction to the railroad prohibiting them from giving certain rate advantages. The order expired before the case reached the Supreme Court. The Court noted the continuing nature of the controversy and suggested that the I.C.C. might issue similar orders in the future. The Court reasoned that its jurisdiction ought not to be defeated by short-term orders which would never, because of their short duration, ever be capable of review by the Court. Likewise, in the case at hand, the State of Nebraska, by paroling Larry Jones, could attempt to moot the controversy in the Supreme Court and have the judgment below vacated. If the same issue were raised by Larry Jones or another litigant, at a later date, each time the

issue would reach this Court, the state could parole the individual involved. Therefore, the state could continue repeating its practices pursuant to Neb. Rev. Stat. 83-180(1) (Reissue 1976), but could continually evade review by this Court.

If this Court should find that the defendants have effectuated voluntary cessation of their allegedly illegal conduct, this alone will not deprive this Court to hear and determine the case. In the case of United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953), the Court indicated that the voluntary cessation of the conduct did not make the case moot:

> . . . The defendant is free to return to his old ways. This together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . .

The Court went on to state that the burden of showing there exists no reasonable expectation of the wrong being repeated is a heavy one.

The public interest in the State of Nebraska of resolving this dispute is present, as is evidenced by the fact that the appellants additionally argue that this cause is not moot.

In the case of Roe v. Wade, 410 U.S. 113 (1973), a pregnant woman challenged state anti-abortion laws. The Court, although the pregnancy was terminated during the litigation, found the case not to be moot, because the abortion issue would otherwise be capable of repetition

yet evading review. The Court stated at p. 12:

> If that termination [pregnancy] makes a case moot pregnancy litigation seldom would survive beyond the appellate state, and appellate review would effectively be denied. Our law should not be that rigid.

Although the case presently before the Court is not proceeding as a class action, the cause was filed as such. The plaintiff sought to characterize the class as all individuals who had been transferred to the Lincoln Regional Center and all who are subject to transfer under the statute in question. This would include all prisoners at the Nebraska Penal and Correctional Complex and Nebraska State Reformatory. Although the case is not presently certified as a class action, the appellee Larry Jones certainly represents a large group interest. If he is not allowed to pursue this action, this will only force relitigation of the same issues by other members of the group.

The case at hand is distinguishable from DeFunis v. Odegaard, 416 U.S. 312 (1974). In DeFunis the issue of mootness did not depend upon the voluntary cessation of the admission practices, but upon the fact that the law student was free to finish his course of study. Larry Jones, to this date, has not been given freedom from the custody of the State of Nebraska.

The present case is also distinguishable from Preiser v. Newkirk, 422 U.S. 395 (1975). In Preiser, the prisoner was to be ". . . eligible for parole within a matter of days. . ."

Preiser, supra., pp. 401, 403. We can only assume that this parole was not of the limited nature effectuated in the case at hand. The Court specifically found at p. 403:

> Any subjective fear Newkirk might entertain of being again transferred, under circumstances similar to those alleged in the complaint or of suffering adverse consequences as a result of the 1972 transfer is indeed remote and speculative and hardly casts that continuing and brooding presence over him that concerned the Court in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974).

Alternatively, should this Court find that an actual case or controversy does not exist, we respectfully request that the judgment of the court below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served upon the opposing counsel of record, Mr. Melvin Kammerlohr, by mailing a copy, first-class postage prepaid, to his address, 2115 State Capitol, Lincoln, Nebraska 68509.

Dated this 15 day of April, 1978.

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